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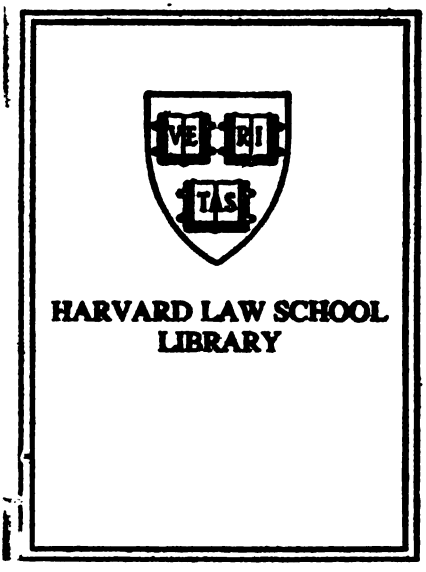

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VOL. 87. MICHIGAN REPORTS.

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Shows where the decisions in this volume have been cited—where to find precedents on their subjects from the courts carrying most weight in this state. The ANNOTATIONS referred to (marked n) give a complete presentation of authorities on the point in question—all the law.

N. B.—Cut out and stick each block on page at its head, or citations for entire volume on inside front cover.

Always consult this table before using a case.

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MICHIGAN REPORTS.

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JULY 28, TO OCTOBER 9, 1891.

WILLIAM D. FULLER,

STATE REPORTER.

VOL. 87.

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For 1891.

SUPREME COURT.

JOHN W. CHAMPLIN (CHIEF JUSTICE), . GRAND RAPIDS.
[TERM EXPIRES DECEMBER 31, 1891.]

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JOHN W. McGRATH, . .	DETROIT, ...	Dec. 31, 1895.
CHARLES D. LONG, . . .	DETROIT, ...	Dec. 31, 1897.
CLAUDIUS B. GRANT, . .	MARQUETTE, . .	Dec. 31, 1899.

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10.	CHAUNCEY H. GAGE, JOHN A. EDGET,	SAGINAW.
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RECORDER'S COURT OF DETROIT,

GEORGE S. SWIFT, Recorder.

F. H. CHAMBERS, Associate Recorder.

Terms of Court.

Jan. 6, March 2, May 4, July 6, Sept. 7, Nov. 2, 1892.

SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

Terms of Court.

March 10 and May 12, 1892.

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TERMS OF COURT FOR 1892.

COUNTIES.	CIR-CUITS.	SESSIONS OF COURT.			
Alcona	23	January 5.	June 7.	October 4.	
Alger	11	May 10.	Nov. 8.		
Allegan	20	February 8.	May 16.	October 3.	December 5.
Alpena	26	February 9.	May 3.	August 9.	November 1.
Antrim	13	February 2.	April 26.	July 19.	November 28.
Arenac	18	February 29.	Aug. 29.		
Baraga	12	January 5.	July 5.	October 4.	
Barry	5	February 8.	May 2.	August 15.	November 14.
Bay	18	March 1.	June 7.	September 6.	December 6.
Benzie	28	April 5.	Aug. 2.	December 13.	
Berrien	2	January 12.	March 15.	May 17.	October 18.
Branch	15	March 7.	June 13.	October 3.	December 5.
Calhoun	5	March 14.	June 6.	September 12.	December 5.
Cass	2	February 16.	April 26.	September 27.	December 6.
Charlevoix	13	January 26.	April 12.	July 13.	November 21.
Cheboygan	33	January 26.	April 26.	July 26.	September 27.
Chippewa	11	February 9.	May 17.	September 20.	November 23.
Clare	21	January 4.	March 28	June 27.	September 19.
Clinton	29	February 1.	April 25.	June 27.	November 14.
Crawford	23	January 12.	June 14.	October 11.	
Delta	25	January 19.	April 19.	July 26.	October 18.
Dickinson	25	January 5.	April 5.	July 19.	October 10.
Eaton	5	January 11.	April 11.	July 4.	October 10.
Emmet	33	January 5.	April 5.	July 12.	September 6.
Genesee	7	January 4.	April 5.	August 1.	October 10.
Gladwin	18	April 11.	Oct. 17.		
Gogebic	32	February 9.	May 10.	August 16.	November 15.
G'd Traverse	13	January 4.	April 5.	July 5.	November 14.
Gratiot	29	March 14.	June 6.	September 12.	December 5.
Hillsdale	1	January 12.	March 15.	September 6.	November 8.
Houghton	12	January 19.	April 26.	August 2.	November 1.
Huron	24	January 4.	March 14	June 6.	October 24.
Ingham	30	January 11.	March 14.	May 16.	September 26.
Ionia	8	February 1.	May 2.	September 19.	November 7.
Iosco	23	February 2.	May 3.	August 2.	November 1.
Iron	25	February 15.	June 6.	October 3.	
Isabella	21	February 22.	May 16.	September 5.	October 24.

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TERMS OF COURT FOR 1892.

COUNTIES.	CIRCUITS.	SESSIONS OF COURT.			
Jackson	4	Jan. 4, March 7.	May 2.	September 12.	November 14.
Kalamazoo	9	February 15.	May 16.	October 10.	December 12.
Kalkaska	28	January 19.	April 19.	July 26.	November 1.
Kent	17	March 7.	May 2.	September 26	December 5.
Keweenaw	12	January 12.	July 12.	October 11.	
Lake	19	February 15.	June 20.	October 10.	
Lapeer	6	January 11.	March 14.	July 11.	November 7.
Leelanaw	13	February 9.	May 17.	October 4.	
Lenawee	1	February 9.	April 26.	October 4.	December 13.
Livingston	30	February 8.	April 18.	June 20.	November 14.
Luce	11	May 3.	Nov. 1.		
Mackinac	33	February 23.	June 28.	August 16.	October 25.
Macomb	16	January 11.	April 11.	June 20.	October 10.
Manistee	19	February 1.	May 2.	August 8.	November 14.
Manitou	33	May 17.	Oct. 18.		
Marquette	25	February 23.	May 16.	September 13.	December 6.
Mason	19	January 4.	April 4.	July 4.	October 3.
Mecosta	27	January 5.	April 5.	July 5.	November 1.
Menominee	25	February 1.	May 2.	August 22.	November 14.
Midland	21	January 18.	April 11.	August 29.	October 3.
Missaukee	28	March 1.	May 24.	September 6.	December 6.
Monroe	22	February 2.	April 5.	September 13.	November 1.
Montcalm	8	March 7.	June 6.	October 3.	December 5.
Montmorency	26	May 17.	Oct. 18.		
Muskegon	14	February 8.	May 9.	September 12.	November 28.
Newaygo	27	March 1.	June 7.	October 4.	December 6.
Oakland	6	February 1.	May 2.	September 19.	December 5.
Oceana	14	January 11.	April 18.	August 15.	October 24.
Ogemaw	23	January 19.	June 21.	October 18.	
Ontonagon	32	February 2.	June 21.	October 18.	
Osceola	19	March 7.	June 6.	September 19.	December 12.
Oscoda	23	January 26.	June 28.	October 25.	
Otsego	26	January 19.	June 21.	October 4.	
Ottawa	20	January 11.	March 14.	August 1.	November 7.
Presque Isle	26	January 12.	June 14.	October 11.	
Roscommon	23	January 12.	May 10.	September 13.	
Saginaw	10	January 11.	March 14.	May 9, Sept. 12.	November 14.
Sanilac	24	January 18.	April 18.	June 27.	September 26.
Schoolcraft	11	January 12.	April 19.	September 6.	
Shiawassee	7	February 8.	May 9.	September 5.	November 21.
St. Clair	31	February 1.	Apr. 4, Jun 6	October 3.	December 5.
St. Joseph	15	January 19.	March 22.	July 12.	October 26.
Tuscola	24	February 9.	May 10.	September 6.	December 6.
Van Buren	9	January 11.	April 11.	September 12.	November 14.
Washtenaw	22	March 7.	May 2.	October 3.	December 5.
Wayne	3	January 5.	April 5.	June 21.	September 13.
Wexford	28	March 8.	June 7.	September 20.	December 20.

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REPORTER'S NOTE.

Attention is called to the Table of Terms of Court for 1892 in this volume, which has been compiled from *data* furnished by the several circuit judges; and also to Table of Cases Reported, pages ix and x, which is inserted for convenience of reference.

By the time this volume is issued, Volume 88 will be nearly printed, and will include all opinions handed down prior to the December filing, 1891, making 30 volumes of the new series of reports.

The following mistakes were discovered too late for correction in the volumes in which they occur:

In Table of Cases Reported in 85 Mich. at page xxiii, "*Manistee* Circuit Judge, Gaffney v.," should read, "*Missaukee* Circuit Judge, Gaffney v."

In *Newland v. Circuit Judge*, 85 Mich. 154, line 18, "are *not* non-residents" should read "are non-residents."

In *Fraser v. Haggerty*, 86 Mich. 528–535, the running heading at top of page should be *Fraser v. Haggerty*.

In *Conger v. Railroad Co.*, 86 Mich. 77, line 8 of opinion, "breaking" should read "braking."

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Partnership—Statements of the cashier of a banking firm, whose general agency has been established, made to a proposed depositor, as to the existence of the firm, are admissible as tending to establish such existence—Testimony of the proposed depositor that he made deposits in reliance upon the information thus received, and that from the time of receiving it he understood that the persons named by the cashier composed the firm, is also admissible—The omission of a banking firm, formed on the dissolution of a former firm to continue the business, to file with the county clerk a certificate giving the names of the members of the new firm, pursuant to

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How. Stat. §§ 8128, 8129, cannot be shown, in a suit involving the question of the existence of the new firm, in support of a claim that until such filing the old firm could not be legally dissolved and a new one formed.

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ISAAC P. CHRISTIANCY.

At the opening of the Court on Tuesday, October 14, 1890, Hon. BENJAMIN W. HUSTON, Attorney General, presented, with appropriate remarks, the following memorial on the death of the Hon. ISAAC P. CHRISTIANCY, formerly one of the Justices of this Court:

Memorial adopted at a meeting of the Wayne County Bar, at Detroit, called by the Hon. George V. N. Lothrop, Wednesday, September 17, 1890:

The death of the Hon. ISAAC P. CHRISTIANCY, following so soon that of his distinguished colleague on the Bench, Judge CAMPBELL, is an event which cannot fail to make a profound impression on the bar and people of Michigan. Judge CHRISTIANCY was the last survivor of the original members of the distinguished Supreme Court of Michigan of 1858. Though his services in other spheres of his public life were marked and valuable, yet it was in his judicial career that his great qualities of mind and character shone forth most conspicuously. It was here that he found his proper field of labor.

He came to the Bench at the age of forty-five, in the full maturity of his powers. He had diligently prepared himself for his work. He had not only mastered his profession, but he had given the most thoughtful study to the grave political questions which then agitated the whole country. He was an inflexible lover of justice and

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human freedom, and in the light of these principles he felt that the great trust that had fallen to his hands was to be administered. For seventeen years his judicial service was continuous, and may be truly said to have been steadily rising in power and efficiency. His judgments in important causes were always distinguished for thorough research, for comprehensive survey, and for logical strength of expression. It was during his incumbency that our Supreme Court rose to its well-won and proud distinction among the courts of the Union.

His service as a senator and as a foreign minister, though brief, was honorable to himself and useful to his country. His private life was lived with purity and dignity. The influence of such a life, happily, does not end with death. It serves to make a man's profession more elevated and useful, and survives as a monitor and guide to all who would rightly serve their country and their fellow-men.

The Bar of Detroit, thus venerating the memory of Judge CHRISTIANCY, speaking for themselves, and, as they believe, for their brethren in the State at large, have thought it fit, by this brief minute, to give formal expression to their respect and affection, and to direct that it be laid before the Supreme Court and the courts of Wayne county for such action as may be thought appropriate.

Hon. MOSES W. TAGGART, of Grand Rapids, spoke as follows:

By appointment of the Grand Rapids Bar I was selected to represent such bar upon the presentation of resolutions of respect to the memory of Judge ISAAC P. CHRISTIANCY. The Bar of Grand Rapids adopted resolutions of similar import, to be presented in the absence of other suitable

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resolutions, the presentment of which would now be superfluous.

When a man has gone through life, done well what head or hand found to do, when to the performance of such duties he has brought to bear great energy, industry, and commanding mental gifts, and wavered neither to the right nor left, and wrought out results so strong and perfect that they stand as landmarks and beacon lights for others traversing the same paths, then indeed has he builded for himself a fitting monument, and acted the part of the wise servant. The works of Judge CHRISTIANCY are of this character. Painstaking, superior, conscientious judicial labor did he perform, as is abundantly evidenced by the records of this Court.

It is said no material thing is ever lost, however difficult of identity. In like manner it can as truly be said, the master work of the true genius in the fields of mental labor can never be lost. The author may become unknown, but the great truths and principles he has brought forth will survive to the end of time. I believe the labors of Judge CHRISTIANCY upon this Bench he so many years adorned, his able, at times eloquent, enunciation of legal principles, will last as long as law shall be administered in this Court, State, and Nation.

The record of this Court, like that of our admirable school system, is the pride of every true son of Michigan; nor is its fame limited to the bounds of the Atlantic or Pacific. In the making of such record Judge CHRISTIANCY was the peer of the great judicial minds that have given to the Court its enviable position and reputation.

To the young practitioner, coming to this Court with his maiden argument, Judge CHRISTIANCY, with his vigorous mind and *physique*, seemed the impersonation of greatness, to be feared, but, as his kindly presence became more familiar, to be trusted; to the more expe-

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rienced attorneys, sure that both law and equity were upon their side, a rock to sustain the weak and overthrow the strong, if not the ally of right.

Judge CHRISTIANCY was neither self-seeking nor self-asserting,—evidence of true greatness,—but, in sustaining a position taken after mature deliberation, he was most forcible, and his reasoning difficult to be met and overcome.

He apparently little appreciated the high position actually held by him in the opinion of the profession or people. I have known of his asking some little favor in behalf of a friend, and in the request he was as unassuming as a child, and it was accompanied by an apology for what he thought might be construed improper interference with the duties of another.

The forced inactivity of the last years of Judge CHRISTIANCY, owing largely to his ill health, bore heavily upon him, and made him at times long for the great change which has now come. The love of labor was there, but the strength to perform it was wanting. He had felt the exhilaration of victories won in great mental contests, and could not rest entirely content a silent spectator in the world. Rest to him was in activity, not in freedom from labor.

> "There is a fire
> And motion of the soul which will not dwell
> In its own narrow being, but aspire
> Beyond the fitting medium of desire,
> And, but once kindled, quenchless evermore,
> * * * * * nor can tire
> Of aught but rest."

It is meet that we should pay tribute to such ability and worth in words and works, as we can no better honor him than to follow his footsteps in the profession of his and our choice. Kind friends have performed the last

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sad offices, and now that his spirit has passed from earthly scenes, and he laid away to rest, it but remains for his brethren of the profession to cull and lay aside a few flowers in his memory, give the last greeting, and move on.

I cordially support the motion made for the adoption of these resolutions, which are not of a perfunctory nature, but from the heart.

Remarks of S. L. KILBOURNE, of Lansing:

May it please the Court:

In this city of his home, and intimately acquainted with him for twenty years, I cannot be silent when a memorial is to be made commemorative of the manliness and worth of Judge CHRISTIANCY; and yet I need say little, for his life is an open book, in which all may read his eulogy.

His death removes from among us the last of the men first elected to the Supreme Court after its institution in its present form. Justices MARTIN and MANNING had long preceded him; Mr. Justice CAMPBELL, in his robes of office, had just fallen, and the Court was convened to do honor to the memory of that great lawyer.

Among the many and eloquent expressions of grief that fell from the lips of distinguished mourners on that occasion, well do we remember the faltering and emotion-laden utterances of Judge CHRISTIANCY, as he came, an old man, to speak for the last time in the Court he so long had graced, and tell of his deep sorrow at the sudden and unexpected death of the last of his first judicial associates. That event, sad to all, impressed him as it did no other man. He seemed to feel that none other stood between him and the great beyond, and he had nothing to do but follow on, out of this bright world he loved into the unknown realms. He looked back to the

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years when he worked as a member of this Court, and to its thousand associations, as the most pleasing of his life, and the men who began and continued that work with him grew dearer as the years advanced. The death of Judge CAMPBELL seemed a rude breaking of the dearest link connecting him with the early days, and it shocked and filled him with sadness.

Ascending the Bench in the year 1858, he continued uninterruptedly a member of the Court until February, 1875, when he resigned to take the seat in the United States Senate to which he had recently been elected. In February, 1879, he was appointed minister to Peru, and, leaving the senate, was abroad until 1881, when his public career closed, and he returned to his home in Lansing, where he lived, engaged in literary work, until September last, when he put aside the cares and burdens of earthly existence, and entered into that broader and higher life, which he had long contemplated only with the pleasure and sense of relief that come from an intelligent belief in the wisdom and goodness of the Great Judge. Such, in brief, is the story of one of the foremost men of Michigan.

With the lapse of time—a decade, more or less, will do—the greatest life, and years of honorable and valuable public service, become but a memory, and are epitomized in a few lines; but how little do they tell of the real life and the labor of one who for seventeen years sat with dignity and learning in the highest judicial seat of a great people. Fortunately for the fame of such a man, historians are unnecessary. Day by day he reasoned and wrote his best thoughts, and the State has published and preserved them in enduring volumes. The present and the future will read them and take note of this man.

On this occasion we are only called upon, nor can we do more, than to place on record an expression of our

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great esteem for the man and the jurist. The resolutions, framed by those who worked with and knew him best, amply and truly testify to his great ability and worth.

Justly we cannot mourn for those who have nobly filled the measure of human life. He was fortunate in being called to office in the early formative period of the State, when her foundations were to be laid, and to have remained a member of the court of final determination until her judicial system had become rounded and fixed, and her constitutional limitations established. Equally fortunate was he in being associated with those illustrious men whose wisdom, learning, and industry joined his in guiding the young State through its rapid growth and developing needs, and moulding it into a commonwealth second to none in the Union, and within whose borders equality of the highest and the humblest before the law, by legislation and judicial decision, is firmly fixed. His was the fortune to contribute to the establishing of a court whose opinions rank with those of the oldest states, and have made Michigan known and respected wherever the common law is administered.

Such a life work should gratify any ambition, and to be spared in an honored old age, in health and mental strength, to witness the good fruits of his labors, was a pleasure that brightened his retirement, and as he looked back over years of public toil brought him as few regrets as falls to man.

In the quiet comfort of home, enjoying the friendships of years, with little of illness or pain, he sank to rest, thus peacefully closing a noble career, in which his splendid powers were illumined and guided by the highest sense of honor.

Chief Justice CHAMPLIN, upon behalf of the Court, responded as follows:

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When the messenger of death beckons to one whose days are lengthened beyond the years allotted to man, who walks wearily under the burdens of life, we bow with resignation to the summons which calls him to enter into the eternal rest. Such an one fills out the cycle of human existence. He springs from a source unknown, and sinks again into the unknown,—that vast cemetery in which the dead past lies buried, and over whose graves the dark wave of oblivion shall forever roll. To a few, a very few, history will recall and seek to perpetuate what they said and did; but to the many, to nearly all that have ever lived and trod the earth, the dark pall forever obscures them from the sight and memory of the living.

Our human existence is made up of the past and the present. The events of to-day become the history of to-morrow. The current of our lives is continually flowing into the vast ocean of the past. The great book of recorded time, whose leaves are composed of the yesterdays which have gone since creation's dawn, tells the tale of each individual life. In the present are compressed all the realities of our being. It contains all its joys and sorrows, all its pains and pleasures, all its toils and hardships, all its rest and recreation, all its loves and hates, all the memories of the past, and all its hopes of the future. Who can adequately portray or define the future? It is the great realm from whose matrix spring the germs that people the earth with all there is or is to be. No one can penetrate its mysteries; but it approaches from beyond, and as its profound depths come in contact with the present it momentarily assumes a real existence, and instantly vanishes with noiseless tread into the past.

So the future and the past are separated by only a point of time, less than a tick of a watch, which we call the present, and our pulse-beats mark the silent boundaries between the future and the past.

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It is a pleasant thought for us to entertain that our virtues, whatever they may be, will survive us, and live in the memories of our fellow-men. But how short and evanescent that life! It is like the sweet perfume of a flower, that gives a sensation of pleasure for a moment, and is gone forever. We should deceive ourselves if we should expect that the virtue, the worth, the grand character of those departed this life are engraved upon the memory of the living as in enduring brass, when they are in fact written as upon shifting sands, to be soon obliterated by the onward march and struggle for existence.

These thoughts are forcibly presented to our minds upon occasions such as this, when we are brought to consider the loosening of the silver cord that bound one so near and dear to us, and its breaking asunder. A bright and honorable career is ended, and fitting eulogies have been spoken in deserved praise of a great man, a distinguished jurist, and an esteemed fellow-citizen.

Our lamented brother has left an enduring memorial of his legal ability, of his wisdom, and his close discrimination of legal principles in the published volumes of Michigan Reports which contain the opinions written by him. He was a close reasoner, logical in his methods, philosophical in treatment, proceeding regularly from premise to conclusion. He was one of the four Justices who were first chosen to the judgeship of the independent Supreme Bench, and entered upon the duties of that office January 1, 1858. He resigned February 27, 1875, to enter upon the higher duties of Senator in the Congress of the United States. The wisdom of laying aside the judicial ermine for the senatorial toga is to my mind doubtful. He left the Bench in the prime and vigor of manhood; his judgment was ripe; years of experience lent

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aid to his natural attainments, and he was regarded by the bar of Michigan as one of the greatest jurists that adorned the Bench. Previous to his coming to the Bench he had filled several political offices, and had figured largely as a politician, and doubtless the political field had its allurements, and was congenial to his tastes. The high office tendered him also offered a broader field to his ambition, and we ought not to wonder that he accepted the glittering prize. After serving as senator he entered the more difficult field of diplomacy. Appointed minister to Peru, he saw that unfortunate people forced to succumb to the superior powers of Chili.

In looking back over the history of his life, and considering the various positions of trust and honor he has filled, the people of his State will point with greatest pride to his judicial labors as the brightest and most enduring monument of his fame.

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JUNE TERM, 1891.*

ELBRIDGE G. GOODRICH v. FRANK B. SMITH.

Vendor and vendee—Fraud—Cancellation of deed.[1]

Complainant filed a bill to set aside an exchange of real estate owned by him for two mortgages upon a farm formerly owned by the defendant, and for the restoration of his property, for alleged fraud in the transfer because of the falsity of the representations which brought it about; and the Court find that the essential allegations of the bill are established by the testimony, and that complainant is entitled to the relief prayed for. Only questions of fact are involved.

Appeal from Hillsdale. (Lane, J.) Argued May 15, 1891. Decided July 28, 1891.

Bill to set aside an exchange of real estate for mortgages for alleged fraud in the transfer. Decree dismissing bill reversed, and one entered in this Court granting the relief prayed. The facts are stated in the opinion.

James S. Galloway and *E. L. Koon* (*Warner J. Sampson*, of counsel), for complainant.

A. B. St. John, *Pealer Bros.*, and *Dallas Boudeman*, for defendant.

MORSE, J. The complainant is an old gentleman, now

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*Continued from Vol. 86.

[1] For full digest of points decided, see *Table of Cases Reported.*

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over 70 years of age. The evidence shows that he is an illiterate man, although he has transacted in his life-time considerable business in the way of buying, selling, and exchanging farms, and in loaning money, and more than is ordinarily done by people of his class and condition. He was a farmer for many years, owning and living upon several farms in different parts of the country. He finally traded for 17 lots and 13 houses in the city of Hillsdale. He lived in one of these houses in 1888, with his sister, who kept house for him, he having never been married. On the 8th of September, 1888, he exchanged all of this Hillsdale property for two mortgages upon a farm, formerly owned by the defendant, in Kalamazoo county. The mortgages were for $5,000 and $8,000, respectively. This bill is filed against the defendant to set aside said exchange, and to have his property restored to complainant, for alleged fraud in the transfer, and the falsity of the representations which brought it about.

The bill alleges the fraud to consist in the following:

1. That the said defendant falsely represented to him that the land covered by the two mortgages was very valuable, and worth a large sum of money, and that the defendant had lately conveyed the said farm to Frank C. Davis and Jenny M. Davis, his wife, who were the makers of the said mortgages; that they, the Davises, had paid Smith down the sum of $12,000 in cash; and that the two mortgages, and the notes for which they were security, were given in part payment of the purchase money for said farm.

2. That defendant represented that said Davis was a man of property; that the notes were good, and could be collected of said Davis.

3. That Smith also represented that these two mortgages were first mortgages upon the land, and that there were no other mortgages or liens ahead of these mortgages, but that all other mortgages and liens upon said premises were subject to the lien of these mortgages, and that such mortgages were first-class security.

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Complainant alleges that he was induced by these representations to make the trade, and that each and all of them were false, and known to be so by the defendant; that the exchange was made at the home of Smith in Three Rivers, Mich.; that the defendant is a man of extremely plausible manners, well calculated to deceive the complainant, who is a plain, uneducated man, but little accustomed to business; that said Smith lived in such fine style, with all the appearances of wealth, that he so boasted of his riches, and entertained the complainant so handsomely, that he entirely won his confidence, and induced him to make the trade by frequent repetition of all the false and fraudulent statements hereinbefore set forth, and that in making the exchange he relied entirely upon such statements.

He further charges that the said mortgages were not first mortgages, but both are and were at the time of the trade subject to a $20,000 mortgage, executed August 7, 1885, by the said defendant, Frank B. Smith, to Marie M. Smith, Henry B. Smith, and Mamie B. Smith, and assigned by them to the Standard Life & Accident Insurance Company of Detroit, Mich., which mortgage was the first mortgage lien upon the premises, and upon which there was due and unpaid the sum of $20,000; that the conveyance of the farm by the defendant to Davis and his wife was fraudulent, and for the purpose of enabling Smith to perpetrate upon some one the same fraud that he practiced upon complainant; that Davis and wife were both pecuniarily irresponsible, and that no payment of $12,000, in cash or otherwise, was ever made by them to Smith.

Complainant alleges a tender of an assignment back to defendant of these mortgages, and a demand of Smith that he reconvey the premises in Hillsdale back to complainant, which tender and demand were both refused by

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defendant. He prays that his deed to Smith may be declared void, and that Smith be decreed to execute to him a proper deed of the Hillsdale property, and to accept from complainant the mortgages and his reassignment thereof, and that an injunction issue to preserve his rights in the premises.

Defendant answered, denying any false representations.

The case was brought on for hearing in the circuit court for the county of Hillsdale, in chancery, upon testimony taken in open court. The circuit judge, Hon. V. H. Lane, announced his opinion in favor of defendant, and directed a decree dismissing complainant's bill. Before the decree was drafted complainant made application to amend his bill, and it was permitted to be amended. The material averments in this amended bill, in addition to those in the original bill, were that defendant represented that Mrs. Davis had $20,000 coming to her from her grandfather's estate; that Mrs. Davis was, at the time she executed the notes and mortgages obtained by complainant of Smith, a minor, under the age of 21 years, and therefore they could not be enforced against her, which fact was known to the defendant when the trade was made; that only a small sum was in fact coming to Mrs. Davis from her grandfather, which the defendant also well knew; also that Smith, at the time of the exchange, was wholly irresponsible financially; that the land was not worth the sum of $45,000, and that the mortgages received by complainant were worthless.

The defendant answered, denying all charges of fraud, and alleging that since the commencement of this suit he had discovered that Mrs. Davis was a minor at the time she executed the notes and mortgages, but that since he had made such discovery he had procured from said Jennie M. Davis and her husband, Frank C. Davis, a ratification of both said notes and mortgages for the ben-

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efit of complainant, and had tendered the same to complainant's solicitors, and filed the same with the clerk of the court, for the purpose of delivering the same to the complainant, if he desired them.

Testimony was taken upon these new issues, which ended in the court adhering to its former decision, the circuit judge filing a written opinion, which is given in the record.

The complainant appeals.

After a careful examination of the record, I am satisfied, as was the court below, that the complainant has been wronged. He has, in effect, been defrauded out of his property. I do not consider it profitable to go into a detailed discussion of the testimony. It is true that the complainant's case rests mainly upon his own testimony, except as he is corroborated by some of the facts and circumstances disclosed in the testimony. He is contradicted on every material point by the defendant, whose testimony is sustained in many particulars by the testimony of Burt Smith, his brother, and by his mother and Davis. I must, under the circumstances, give credence to the complainant. The two Smiths were impeached by some of the most substantial citizens of Three Rivers, and some of those who were brought to sustain their reputation for truth and veracity lived outside of the village, and admitted that in the village there was talk both ways about them. It is certain that they do not bear a good general reputation for truth and veracity in the community where they live, nor does the record in this case, or their transactions shown therein, impress me favorably. Frank, at least, is too sharp to be honest. The mother was not a candid witness, and absolutely refused to answer questions on cross-examination that were pertinent and proper; and her refusal to do so might have been based on a desire upon her part to

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avoid details, which, if given, might have seriously affected or impaired the value of some of her evidence given on her direct examination. The man Davis would seem to be a mere tool of Smith. In the language attributed to the circuit judge, when he announced his oral decision, it seems to me that—

"The testimony of the members of the family of Mr. Smith, when taken as a whole, shows a very singular course of dealing between the members of the family,—a course which is not quite consistent, such as the testimony discloses, with entire good faith and honesty on the part of Mr. Smith."

The testimony shows that the farm in Kalamazoo county, upon which these mortgages were given, originally belonged to the father of the defendant. He died, and the farm became the property of the mother and the two sons. Many shifts and changes of the property were thereafter made; and July 27, 1885, the mother and Burt Smith deeded their interests to the defendant, who executed back to his mother a mortgage of $25,000 and another of $15,000. These mortgages were discharged August 18, 1885. June 4, 1885, a mortgage was executed to Wolf Bros. for $23,000, and afterwards discharged. When the mortgages to his mother were discharged, there was a $20,000 mortgage on the land to her and Henry B. Smith (Burt) and Mamie B. Smith, dated August 7, 1885, which by its terms became due August 7, 1888. This mortgage is still on the premises, and was the first mortgage lien upon the land, and past due when the complainant traded with defendant. November 12, 1887, Frank B. Smith executed to his uncle, J. N. Wheeler, of Chicago, Ill., a bill of sale of all his personal property upon this farm, including the wheat upon the ground, for an expressed consideration of $10,000; and Wheeler gave him a power of attorney to manage and dispose of this property, as well as to manage the

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farm, of which the defendant executed to him at the same time a lease to run for five years from November 12, 1887, for which lease Wheeler was to pay him $2,000 per year, or $10,000 in all, the same consideration expressed in the bill of sale of the personal property. This transaction is claimed by complainant's counsel to have been made to hinder and delay or defraud defendant's creditors, but this is denied by defendant. With this farm in this situation, the defendant on the 21st day of December, 1887, contracted with Davis in writing, as follows, each keeping a duplicate copy:

"Sold to Frank C. Davis and wife as follows [here follows description of land], containing 646 acres, more or less, to be paid for as follows:

By paying first mortgage, given Aug. 7, '85, due Aug. 5, '88, amount of same	$20,000 00
By paying interest due July 1, 1887, $700, on the $20,000	700 00
By paying interest from July 1, 1887, to Dec. 21, 1887, on $20,000	661 00
By paying interest on $700 from July 1, 1887, to Dec. 21, 1887	33 06
By F. B. Smith's note, due on or before Jan. 1, 1888, given October 1, 1887	238 00
By interest on the same	8 70
By one-half interest in wheat 8 acres on Geo. Davis' farm	28 00
By one pair of horses and wagon (Davis' interest)	225 00
By lease from John N. Wheeler, Nov. 12, 1887, for 5 years, to run 4 years, 8 mo., 20 days	9,977 79
Cash	133 45
Order for work	200 00
By mortgage on above-described land	8,000 00
By mortgage on above-described land	5,000 00
	$45,000 00

"The above is terms of sale as agreed upon by and between Frank B. Smith and Frank C. Davis, this 21st day of December, 1887.

"FRANK B. SMITH.
"FRANK C. DAVIS."

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The land was deeded to the Davises in pursuance of this contract. Davis was a man having, all told, at the time he made this purchase, between $500 and $600. The mortgage of $20,000, on which there was then due $1,394.06 interest, would fall due in less than a year, and the lease running to Wheeler had nearly its full term, less than two months of the same having expired. The sale of this land to Davis has every appearance, upon its face, of a sham transaction for some purpose other than an honest one; and there is testimony and various facts and circumstances tending to show that the conveyance was not a real one, and made with some fraudulent object in view. The purported payment of $12,000 down, consisted of the estimated incumbrance of this Wheeler lease, over $9,000; the interest due on this $20,000 mortgage, which has never been paid; Davis' interest in a span of horses and wagon; a note of Smith; an order for work; and the paltry sum of $133.45 in cash.

It is not disputed that Goodrich was informed that Davis paid $12,000 down to Smith upon the purchase of this farm. It is denied that he was told that the payment was made in cash, but it is nowhere shown that he was told in what the payment consisted. An attempt was made to prove that Goodrich wanted a copy of this contract, and was furnished one, which he took home with him, and that he gave a receipt for the same, which was retained by Smith, a letter-press copy of which was put in evidence. The claimed original was in evidence, but during the trial was left in the hands of the clerk and lost. Goodrich denies taking any such copy, or that he ever saw the contract. He thinks the signature to the receipt looks like his own, but denies that he ever wrote it. Why Smith should take a receipt for this copy that he swears he let Goodrich have is not

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explained very satisfactorily. It would seem to have been unnecessary, unless Smith was preparing for the contingency of a lawsuit, and preserving evidence in view of such contingency.

We think from all the testimony that Goodrich was given to understand expressly that Davis paid $12,000 cash down on the purchase of this land, and that it had its influence in inducing him to make the trade. He was also told that Davis and his wife had property, and that the notes were good and collectible against them, which was untrue. Goodrich swears that he was told by both Smith and Davis that the $20,000 mortgage was subject to the ones he received, which testimony, we are satisfied, is the truth. It does not seem possible that any man, knowing the whole circumstances of Smith's sale of the land to Davis, and that this mortgage was then past due, with accrued interest upon it, with no means of his own to meet it, would have taken these later mortgages for his property in Hillsdale. It is testified to by both the Smith brothers and their mother that Goodrich had the abstracts of this farm and examined them; and a man by the name of Drake opportunely happened in just then to pay Smith some rent, and swears that he saw the abstracts in complainant's hands, who was examining them, and, while Drake was there, asked several questions about this $20,000 mortgage, which, if true, would clearly indicate that he knew the situation of this mortgage, and that it was a prior lien to the ones that he received. But Drake's testimony does not impress me as truthful, and his character as developed by his own testimony, and a refusal to answer certain questions touching his life, does not seem to be of the very best.

I am of the opinion that Mr. Goodrich never examined the abstracts, and that his story that he only saw

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them as Smith took them out and put them back again is true. He testifies that, while he usually required an abstract in his real-estate deals, he had never examined one himself, always employing some one else to do this for him; that he could not read and understand one. He was at the home of Smith, where he had been for three days, and, during that time, had been led by the shrewdness and artfulness of Smith to have implicit confidence in him, and he trusted his declaration, and that of Davis, that his mortgages were all right, and the first liens upon the land. This confidence was not abated until just before he left for home, when he was informed by some one in Three Rivers that he had better look out, and that Davis had paid nothing on the farm, and was irresponsible financially. As soon as he reached his home, disturbed by this warning, he consulted an attorney, placed the matter in his hands, and the result of the attorney's investigation was the beginning of this suit soon thereafter.

But, even if he did examine the abstracts, he would not have been likely to have gained much knowledge from them. An abstract of any considerable length, and with a multitude of conveyances, is not an easy matter of dissection by a man of the education or experience of Goodrich, and it sometimes takes a pretty good lawyer to unravel one, and get at the real situation of the title. These abstracts, four in number, were elaborate ones, containing, respectively, 55, 30, 20, and 35 odd conveyances. The circuit judge says in his written opinion that the complainant possessed information that showed him beyond question that the $20,000 mortgage must have been a prior lien to the ones he was getting by this trade. This the circuit judge probably deduces from the fact that Goodrich admits that Davis told him that on the purchase of the place they only gave these two

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mortgages of $5,000 and $8,000; that he knew the $20,000 mortgage was outstanding against the farm, and ought to have known, it being given by some one else than Davis, that it was a prior lien. This does not necessarily follow when we consider the illiteracy of Goodrich, and the fact that he was informed by both Smith and Davis, as he testifies, that the mortgage was subject to those he was receiving. He says that he paid no attention to this mortgage on the strength of these representations, and relied implicitly upon them.

It is a harsh rule that would impose upon Goodrich, and men like him, who are almost invariably the ones defrauded in such transactions as this was, the standard of knowledge of conveyances and titles that courts possess. It is not a thing to be believed that Goodrich knew the *status* of this mortgage, and did what he did. An excuse for his action cannot be found in such case, except upon the theory that he was a consummate fool, virtually giving away his Hillsdale property, which was the bulk of his possessions. But we can well understand how his confidence in Smith, and his ignorance of this kind of business, could have led, and did lead, him into this trade, with his eyes shut, as it were, by such confidence and ignorance, so that he could not see as we might have seen. The circuit judge was evidently strongly impressed with the injustice that his decision would involve. In conclusion he says:

"The appearance of the witnesses for the defense, so far as called to certify to the circumstances surrounding the exchange, and the character of the narrative they present, in some particulars, at least, was not such as commended itself very strongly to the court. Some of the evidence of the defense it would be very hard to explain away, however. These considerations compel a denial of the relief prayed. I am impressed with the feeling that exact justice does not follow this conclusion.

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I think that the mortgages are really of little value to complainant. The land in question might well be said, under the proof, to be worth the face of the $20,000 and $8,000 and $5,000 mortgages, or nearly so. But the second mortgages are unmarketable, and complainant is not financially able to take care of the $20,000, and must inevitably lose, and quite largely, by the transaction. It is not every loss that the losser may insist on another making good, however.

"As I took occasion to say when this case was submitted on the original hearing, I think that the application of what I understand to be the law to the facts in the case, as established by the complainant's proofs, operates with unfortunate severity on complainant. I may wrongly interpret the conduct of defendant and some of his witnesses. The business habits of defendant seem in some respects peculiar, and I may put a wrong construction upon some of the peculiar transactions developed in the case. The sale of a $45,000 farm to Davis and wife while Davis had not to exceed a few hundred dollars to buy with, the circumstances surrounding the furnishing the memorandum of sale between Smith and Davis to complainant, as well as the dealings between the other members of the family and Wheeler, are difficult to understand and explain on any well-recognized business principles, though it might not conclusively establish dishonesty in the deal with complainant."

It has always seemed to me that in an equity case, where this Court takes the case and deals with it *de novo*, the justice and equity of the case upon the whole record should control it, and that no harsh rule should be allowed to defeat justice, and put a premium upon wrong doing or fraud; such, for instance, as in this case holding the complainant to a degree of care in ascertaining the true state of this $20,000 mortgage such as we might think a man of ordinary prudence and business knowledge would have used in his place. Each individual case should be ruled by its own facts and circumstances, having in view always that justice may prevail and wrong be righted. If this bill is dismissed, the com-

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plainant will lose nearly his all, while, if he prevails, the defendant loses nothing, except the costs of litigation, when he ought to be punished, if possible, for a gross fraud. I do not think the contributory negligence of the complainant, if there be any, should stand in the way of his recovery in such a case as this. I am satisfied that the complainant has been defrauded; that the essential allegations of his bill of complaint have been made out; and that he is entitled to the relief asked.

The decree of the court below will be set aside and vacated, and a decree entered here in conformity to the prayer of complainant's bill, with costs of both courts.

The other Justices concurred.

JOHN C. DONOGHUE v. THE INDIANA & LAKE MICHIGAN RAILWAY COMPANY.

Contract—Directing verdict—Polling jury.

1. A verdict is held to have been properly directed in defendant's favor, the whole trend of the evidence going to show that, if the plaintiff has a cause of action, it is against a third party, who signed the contract upon which defendant is sought to be held in his individual capacity.[1]
2. When a verdict is directed by the court, an issue of law is raised upon the whole case, and the defeated party cannot claim the right to poll the jury.

Error to Berrien. (O'Hara, J.) Argued June 3, 1891. Decided July 28, 1891.

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[1] See, as to right to direct a verdict, note to *Morley v. Insurance Co.*, 85 Mich. 210; *Clow v. Plummer*, Id. 550.

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Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

C. B. Potter (*Potter & Potter*, of counsel), for appellant.

Edward Bacon, for defendant.

CHAMPLIN, C. J. The court directed a verdict for the defendant. This raises the question of law whether the plaintiff had failed to introduce any competent proof to substantiate some material fact in issue.

The question in dispute here is whether the defendant entered into contract relations with the plaintiff. The contract introduced in evidence was not signed by the defendant, and its execution was denied under oath, in accordance with Circuit Court Rule 79. The contract was signed by William Dallin individually, and hence the further question is raised whether, in so signing his name, he acted for and bound the defendant company. He did not purport to sign it as agent, or in any other capacity than as an individual, and there is no testimony in the case tending to show any authority, expressed or implied, originally given or afterwards ratified, from the defendant to Dallin, to sign the contract on behalf of the company. The whole trend of the evidence is to show that, if the plaintiff has a cause of action, it is against Dallin, and not against the company. There was no error in directing a verdict for the defendant.

Plaintiff's counsel claimed the right to poll the jury. The court refused to permit him to do so. There was no error in this. When the court directs a verdict, an issue of law is raised upon the whole case, and there is no fact for the jury to find.

The judgment is affirmed.

The other Justices concurred.

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HENRY C. PENNY, ADMINISTRATOR OF THE ESTATE OF PHILINDA HURLBUT, DECEASED, v. JEROME CROUL.

[See 76 Mich. 471.]

Witness—Evidence—Matters within knowledge of deceased person.

1. An executor was sued in his *individual* character by the administrator of the estate of the widow of the testator for the conversion of certain bonds received from her after the testator's death, but before his will was probated. The executor inventoried the bonds as the property of the estate, and never claimed any personal interest in them. The administrator claimed that they were delivered to the executor for safe-keeping by the widow, who had received them as a gift from her husband during his life-time, which the executor denied. and claimed that the bonds were delivered to him with the understanding that he received them as the property of the estate, and with the free will and consent of the widow. And it is held (by the majority of the Court) that the real issue was between the two estates as to the ownership of the bonds, and that the executor was not disqualified from testifying as a witness under How. Stat. § 7545, which prohibits the *opposite party*, in a suit prosecuted or defended by the heirs or personal representatives of a deceased person, from testifying to facts equally within the knowledge of the decedent, but that an *heir of the widow* was so disqualified.
2. Chief Justice CHAMPLIN filed a dissenting opinion, concurred in by MCGRATH, J., holding that, while the statute in question has been construed as embracing within its spirit the real as well as nominal parties to a suit, no well-considered case has made an exception of the *parties to the record.*

Error to Wayne. (Brevoort, J.) Argued May 13, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinions.

Cutcheon, Stellwagen & Fleming (*F. A. Baker*, of counsel), for appellant.

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William H. Wells, for plaintiff.

[The contention of counsel is fully shown in the opinions, where the authorities are reviewed.—REPORTER.]

MORSE, J. I am satisfied that the defendant, Jerome Croul, was a competent witness in this case.

It was admitted upon the argument by plaintiff's counsel, as it conclusively appears from the record, that the defendant had not converted the bonds in question in this suit to his own individual use, but that he took possession of them for the estate of Chauncey Hurlbut, deceased, and has always held them for said estate. It appears that on his first step as executor of Chauncey Hurlbut's estate he inventoried these bonds as the property of such estate, and has ever since accounted to the probate court of Wayne county for them and the interest accruing upon them.[1] There is no disguising the issue in this suit. It is really a contest between the estates of Philinda and Chauncey Hurlbut for the ownership of these bonds. With such contest Jerome Croul has no concern, save as executor of the latter estate; and he has and claims to have no personal interest in the subject-matter of this suit. This is admitted by the counsel for plaintiff, and yet it is gravely asserted as a matter of law that the plaintiff has a right, by planting his action against Croul individually, not only to change apparently the whole outward face of the contest, but so to shape the conduct and issue upon the trial as to shut out the testimony of Croul as an "opposite party," and,

[1] Chauncey Hurlbut died September 9, 1885, and the defendant testified that he received the bonds in question of Philinda Hurlbut, September 14, 1885, as the property of Chauncey Hurlbut, and had always held them as belonging to his estate. The defendant and Philinda Hurlbut were named as executor and executrix in the will, and were appointed as such on the probate of the will, October 13, 1885, and gave the required bond, after which Mrs. Hurlbut took no further part in the administration of the estate.

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as a consequence thereof, to recover a large sum of money from him personally out of a transaction in which it is admitted he acted as executor, and not for himself, and which he is not allowed to explain, though fraud is charged against him as such executor. There is no excuse for this course, because by the action of Croul the bonds or their proceeds have not been lost to plaintiff's intestate or her heirs. The estate of Chauncey Hurlbut is amply sufficient to pay the judgment in this case twice over.

When we come to examine the question whether or not Mrs. Williams was a competent witness for the plaintiff, it will be plainly apparent why this suit was planted against Jerome Croul individually, and not against him as executor. By making him individually the party defendant, the plaintiff has succeeded, under the interpretation of the statute by the court below, to which I shall soon refer, in proving his case by the principal heir of Mrs. Hurlbut, and has closed the mouth of Croul against a denial of her story. If this is a correct construction of the statute, then it is capable of being made the instrument of the most outrageous injustice, when its enactment was intended to prevent fraud and injustice, and it opens a way by which the estates of deceased persons may be more easily robbed than if no such statute existed; and that, too, by the testimony of those whom the statute intended to debar from giving evidence in their own behalf of facts equally within the knowledge of the deceased.

The statute, as it now exists (Act No. 139, Laws of 1885), having been frequently amended since its first enactment, reads as follows:

"When a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal rep-

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resentatives of a deceased person, the *opposite party, if examined as a witness on his own behalf,* shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person: * * * *Provided,* that whenever the words 'the opposite party' occur in this section, it shall be deemed to include the assignors or assignees of the claim, or any part thereof, in controversy."

It is evident that this statute is intended to reach the real party in interest, and not a mere nominal party, who is not interested in the result of the allowance or disallowance of the claim against the estate of a deceased person, except as it becomes his duty as executor or administrator to prosecute or defend a suit in which the estate is interested. The proviso was attached in 1885, no doubt, for the express purpose of preventing the practice, which prevailed under the statute before such amendment, of assigning the claim against the estate of a deceased person, and then having the assignor sworn as a witness to prove it. The proviso not only cuts off this method of evading it, but also goes further, and prohibits the assignee from testifying, who, in the absence of a fraudulent intent to evade the law in taking the assignment, would be the person to be benefited by the allowance of the claim. It will thus be seen that the Legislature intended not only that the party owning the claim should not be permitted to testify to the matters equally within the knowledge of the deceased person, but also to prevent any evasion of the statute. It was in this view of the statute that we held in *Duryea v. Granger's Estate,* 66 Mich. 593, that an administratrix, if not interested in the estate as heir or otherwise, was not the "opposite party" mentioned in the statute, and against whom its prohibition runs; citing the fact that in *Howard v. Patrick,* 38 Mich. 795, the administratrix

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was held within the statute, for the reason that she was also an heir to the estate of her intestate. It was said in *Duryea v. Granger's Estate* that the suit might well have been entitled "*The Estate of Joseph Granger, Deceased, v. The Estate of Edward Granger, Deceased.*" And in this case now under consideration it might well be entitled "*The Estate of Philinda Hurlbut, Deceased, v. The Estate of Chauncey Hurlbut, Deceased,*" as the real controversy is without doubt between these two estates. And while it is necessary that these two estates should be represented by the respective executors as nominal parties, that persons may be before the court, the real contest is none the less between the estates of the deceased persons, in which the executors have no personal interest, and are affected only as they represent the estate. Notice also the language of the statute, "the opposite party, *if examined as a witness on his own behalf,*" clearly indicating that he is not to be permitted to testify "in his own behalf"—in other words, in his own interest—as against one whose lips are closed by death.

In the suit which we are considering, the claim against the defendant was established by the testimony of Mary Ann Williams, who was a niece and heir of Philinda Hurlbut, and Margaret Williams, a daughter of Mary Ann Williams. It appeared clearly from their evidence, before the plaintiff closed his case, that Croul took possession of the bonds and held them as the executor of Chauncey Hurlbut's estate. Margaret Williams testified that Mrs. Hurlbut called for her bonds, and wanted Croul to bring them back to her; that Croul put her off for a while, and then said: "Those bonds were never calculated for you. They belong to Chauncey Hurlbut's estate;" and that she could not prove that they belonged to her. It was not claimed by any of plaintiff's witnesses that Croul was trying to get any personal benefit

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from these bonds; and it was apparent when the plaintiff rested that Croul was not the real defendant, but only nominally so, because he had been sued in his individual name; that the real defendant was the estate of Chauncey Hurlbut. The defense then showed the proceedings in the probate court,—the filing of the inventory by Croul, in which these bonds were placed as the property of Chauncey Hurlbut's estate; and Jerome Croul's accounts as executor, in which he accounted to said estate for the interest upon the bonds. It was also shown that there had been no distribution of the assets of the estate, and that Philinda Hurlbut in her life-time, and on October 1, 1885, gave him the following receipt for the interest upon these bonds, by such receipt recognizing that he held them as executor of her husband's estate:

"Received, Detroit, October 1, 1885, from Jerome Croul, 40 coupons of $10 each, $400, cut from four per cent. U. S. bonds *belonging to the estate of Chauncey Hurlbut, deceased.*

"PHILINDA HURLBUT."

But when Mr. Croul attempted to state the conversation with Mrs. Hurlbut by which he became possessed of the bonds, or any material circumstance connected with his possession or holding of the same, equally within the knowledge of Mrs. Hurlbut, he was prevented from testifying, under the ruling of the court that he was the "opposite party" mentioned in and intended by the statute, and therefore incompetent to give evidence of any fact equally within the knowledge of plaintiff's intestate. The ruling of the court was erroneous.

Another important question arises in the case: Was Mary Ann Williams a competent witness on behalf of the plaintiff to any facts equally within the knowledge of Chauncey Hurlbut, deceased? She is an heir of Philinda Hurlbut, and, as such, interested in the result of the

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suit. The nominal plaintiff is the administrator of Mrs. Hurlbut's estate, but Mrs. Williams is one of the real parties to the litigation. I think she comes clearly within the intent of the statute. This suit, as heretofore shown, is really a controversy between two estates. Neither Penny, the administrator of Mrs. Hurlbut, nor Jerome Croul, who is defending as the executor of Chauncey Hurlbut, can be said to be an "opposite party." The real parties are the opposite parties, and Mrs. Williams is one of them. The case of *Wright v. Wilson*, 17 Mich. 192, referred to in the brief of plaintiff's counsel, does not touch this case; and *Pendill v. Neuberger*, 64 Mich. 220, also cited to sustain the competency of Mrs. Williams as a witness, is not applicable. In the last case, a son an heir at law of a deceased party was held not disqualified to testify to a conversation between his deceased father and the defendant. The defendant was living. Had he been dead, and the suit being defended by his executor and administrator, the case would be in point. As it is, it has no relevancy to the issue here.

I do not deem it necessary to cite adjudications from other states. This is a question depending upon our own statutes, and I think has been settled by our own Court.

In *Howard v. Patrick*, 38 Mich. 795, and *Duryea v. Granger's Estate*, 66 Id. 593, the reasoning of the opinions would preclude Mrs. Williams from testifying to facts equally within the knowledge of Chauncey Hurlbut, upon the ground that she is an "opposite party" as against his estate. In the first case the testimony of Mrs. Howard was rejected. She was an heir of the estate, as well as administratrix. The question was mooted whether Mrs. Evans, a sister of Mrs. Howard, and equally with her an heir at law of her father, was a competent witness under the statute. It was passed,

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however, without decision, because it was shown that Mrs. Evans had assigned her interest in the claim, and had no interest in the result of the suit. This was before the amendment precluding an assignor from giving evidence.

In *Bachelder v. Brown*, 47 Mich. 366, the real party, who was defending the suit, brought by an executor upon a promissory note, was held to be the real party in interest, and therefore the "opposite party" of the statute, within its meaning and intent, although he did not appear upon the record as a party to the suit.

In keeping with this principle that the court should look at the real, and not the nominal, parties in a cause, is the case of *Wood v. Lenawee Circuit Judge*, 84 Mich. 521, where the question to be considered was an amendment changing the names of parties to a suit. It was there held that the heirs were the real parties to be benefited by the litigation, and that, therefore, the substitution of their names for that of the administrator was admissible.

It was also held in *Youngs v. Cunningham*, 57 Mich. 153, Mr. Justice CHAMPLIN writing the opinion, which was concurred in by all the members of the Court, that B. F. Cunningham, although not a party to the record, was not a competent witness to testify to facts equally within the knowledge of George Cunningham, deceased, whose wife and children were defending in ejectment, because said B. F. Cunningham had executed to the plaintiff, Youngs, a warranty deed of the land in question. The Court said:

"He was under covenant to sustain the title, and the suit was in effect his suit to try the title to the land. If not within the express letter, he comes within the meaning and spirit, of the statute, and is precluded thereby from testifying to facts equally within the knowledge of the deceased."

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In *Mundy v. Foster*, 31 Mich. 321, in a suit in chancery by a husband to have a trust-deed of his deceased wife declared void, and in which the trustees named in such deed were the parties defendant, in speaking of the husband's evidence, the Court said:

"When he assumed to testify to the verbal agreement [with his wife], his position, if not literally within the terms of the statute against admitting a surviving party to a transaction to testify in certain cases (Comp. Laws 1871, § 5968), was clearly within its policy; and, in my judgment, he was not a proper witness to prove the making of the contract."

It will be noticed that the statute since then has been broadened and made more far-reaching by amendments, all of which amendments have been on the road to reach the real parties in interest, and to preclude them from testifying to facts equally within the knowledge of the dead person, whose estate is sought to be depleted by such testimony in the interest of the party offering it.

The court erred in permitting Mary Ann Williams, an heir at law of Mrs. Hurlbut, to give evidence of conversations between Chauncey Hurlbut and his wife, and between said Hurlbut and the witness.

It is argued that the plaintiff had a right to plant this suit against Jerome Croul individually, that the action is one of bailment, and that it is doubtful if Croul could dispute the title of his bailor; but, in any event, the estate of Chauncey Hurlbut could not be bound by the result of this suit.

The right to plant this suit against Jerome Croul individually may be conceded, but the right to maintain it depends upon the facts and circumstances proven in the case. In our opinion, it must be conceded that Jerome Croul had the right to show that he received these bonds of Philinda Hurlbut, of her own free will and consent, and on the understanding that he received

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them by virtue of his being appointed one of the executors under the will of Chauncey Hurlbut, and as the property of said estate; and that he has the right to come in and defend as such executor, and to maintain and prove by competent testimony that the bonds never belonged to Philinda Hurlbut or her estate, but have ever been, and now are, the property of Chauncey Hurlbut, and belong to his estate,—and the estate will be bound in such case by the result of the litigation.

In *Hillman v. Schwenk and Miller*, 68 Mich. 297, and *Hillman v. Schwenk*, Id. 301, a similar case, the executor of an estate was permitted to indemnify the defendant, and assume the defense of a suit brought upon a promissory note; and it was held by so doing the estate would be bound by the result; and, further, that in such case the plaintiff would be precluded from testifying to facts equally within the knowledge of the deceased, although the maker of the note was the person sued and the defendant of record. The issue in those cases was similar to the issue in this. The plaintiff claimed to have obtained the note from the testator by purchase before his death. The executor defended upon the ground that there was no such purchase. Here the claim to the bonds is that they were a gift. The executor's defense is that there was no gift. In the *Hillman v. Schwenk cases* the defendants had no interest in the result, except to pay the note to whom it might be found to belong; and in this case Jerome Croul individually has and claims no interest in these bonds. His only concern is to account to the owner of them. The defense that he is making is the defense of Jerome Croul as executor, which it would have been his duty to have made had the bonds been in the hands of a third person, and such third person had been made a defendant in this suit instead of Croul. He could have stepped in, had the third person

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been sued, and defended as the executor of Chauncey Hurlbut, under the authority of *Hillman v. Schwenk*, and under every principle of law and justice; and we know of no reason why he cannot equally and as well defend as executor in case the suit is planted against him individually, instead of being brought against another, when the issue is the same, to wit: Do the bonds belong to the estate of Philinda Hurlbut or to the estate of Chauncey Hurlbut?

The judgment of the court below must be reversed, and a new trial granted, with costs of this Court to defendant.

LONG and GRANT, JJ., concurred with MORSE, J.

CHAMPLIN, C. J. *(dissenting.)* The plaintiff is the administrator of the estate of Philinda Hurlbut, deceased, and as such brought this suit in *assumpsit* against the defendant to recover the value of 40 United States government bonds, which plaintiff claims the deceased in her life-time placed in defendant's hands for safe-keeping, to be redelivered to her on demand; and that she demanded them, and he refused to deliver them to her, but claimed that they were the property of the estate of Chauncey Hurlbut, deceased, of which he was executor.

Chauncey Hurlbut, at and prior to July 4, 1885, was the owner of the bonds in question. He had in 1879 made a will, which was after his decease admitted to probate, in which he gave his wife his horses, carriages, household furniture, and $10,000 absolutely, and the income of the estate for her life. After her death a few small bequests were to be paid, and the residue of the estate went to trustees for the perpetual benefit of the Detroit Water-Works. *Penny v. Croul*, 76 Mich. 471. Chauncey Hurlbut died September 9, 1885, and his will was admitted to probate October 13, 1885. He left

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Philinda Hurlbut, his wife, surviving him, and no child. Jerome Croul and Philinda Hurlbut were appointed executors, and they qualified; but Philinda Hurlbut never took any part in the execution of the trusts of the will, or in the administration of the estate. She died October 4, 1886, intestate, and the plaintiff in this suit was appointed administrator of her estate. Mrs. Hurlbut had no children. Her father and mother died before she did. Mary Ann Williams is her niece, and Margaret Williams is a daughter of Mary Ann.

It is claimed on the part of the plaintiff that Chauncey Hurlbut, on the 4th day of July, 1885, gave to his wife, Philinda, 40 United States government bonds of the denomination of $1,000 each, and accompanied the gift by immediate personal delivery, in the presence of Mary A. Williams; and upon the trial of this cause the plaintiff introduced testimony to establish such gift *inter vivos*. One of the witnesses produced to establish the facts upon which the plaintiff relies for a recovery is Mrs. Mary Ann Williams, and her competency to testify in the cause under the statute presently mentioned is challenged by defendant.

The plaintiff also claims that after Mr. Hurlbut's death the defendant, Croul, was at the house of the widow, and was informed by her of the gift to her of the aforesaid bonds, and that defendant, Croul, represented that it was very dangerous to keep such bonds in the house,—that there was danger of their being murdered,—and offered to take care of the bonds by placing them in a safe, and promised, if Mrs. Hurlbut would do so, that she might cut off the coupons, and that he would deliver them to her whenever she demanded them; and thereupon she delivered them to him for safe-keeping. The exact date at which this occurred is not given by the plaintiff's witnesses. Margaret Williams testified

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that it was after the probate of the will. Mrs. Williams also thinks it was after the will was proved, but is not certain that it was not before.

Mr. Jerome Croul testified that he received the bonds in suit on the 14th day of September, 1885, as the property of Chauncey Hurlbut, and that he had always held them as the property of Chauncey Hurlbut; that they were received by him from Mrs. Hurlbut, in the presence of John Lund.

The witness Alexander McArthur testified in behalf of the plaintiff that he had a conversation with the defendant about four months after the funeral of Chauncey Hurlbut, in which Croul said that "he had got $40,000 in bonds of the old lady; and I asked him how he done that, and he said, 'I got them for safe-keeping,' and that 'she never would smell them again.'" Mr. Croul was sworn in his own behalf, and testified that Mr. Lund was present when he received the bonds from Mrs. Hurlbut; but Lund was not called to dispute or contradict the testimony given by plaintiff's witnesses as to what transpired on that occasion.

The fact that October 1, 1885, Mrs. Hurlbut signed a receipt for $400 for the coupons, in which Croul had inserted the statement, "Cut from four per cent. U. S. bonds belonging to the estate of Chauncey Hurlbut, deceased," was not conclusive that those bonds belonged to the estate of Chauncey Hurlbut. If the bonds were Mrs. Hurlbut's individual property, she was entitled to the interest; and likewise was she entitled if they belonged to the estate, as the will gave her the whole income during her life-time. The defendant was permitted to introduce any evidence which he had to show that the bonds belonged to the estate of Chauncey Hurlbut at the time of his death, and this receipt was competent testimony to be considered as tending to show

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that the bonds belonged in fact to the Hurlbut estate. Defendant, Croul, offered to testify fully to the interview with Mrs. Hurlbut when he received the bonds from her, but it was excluded under the statute.

It is error to suppose that if Penny, as the administrator of the estate of Mrs. Hurlbut, had brought this action against Croul as executor of the last will of Chauncey Hurlbut, deceased, he would have been a competent witness to testify to facts which, if true, were equally within the knowledge of the deceased, Mrs. Hurlbut. The statute is not based upon the interest or disinterestedness of a party who seeks to testify as a witness, but upon the injustice and impropriety of permitting a party to an action with a representative of a deceased party to testify at all to matters within the knowledge of the deceased, whose executor or administrator has brought or is defending the suit. The mere fact that he is sued as executor would not permit him in a court of law to open his mouth to testify to facts which the other party could not testify to, because his mouth is sealed by death. The law never intended such an absurdity. If it had intended to make an exception in favor of the opposite party who should chance to be appointed executor or administrator, it would have so declared. There is no more reason for repealing the plain provisions of the statute by judicial fiat in favor of executors and administrators than there is in favor of any other disinterested parties; and the law makes no exception in favor of disinterested parties. While the statute has been construed as embracing within its spirit the real as well as nominal parties to a suit, no well-considered case has made an exception of the parties to the record. This will be apparent from a review of our decisions upon that section of the statute.

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In the case of *Downey v. Andrus*, 43 Mich. 65, all of the cases to that time were reviewed.

In *Eccard v. Brush*, 48 Mich. 3, a suit against executors and trustees, held, that complainant could not testify to matters equally within the knowledge of the deceased.

In *Rayburn v. Lumber Co.*, 57 Mich. 273, held, that the opposite party cannot be permitted to testify to matters equally within the knowledge of a deceased officer of the company sued, nor of a deceased partner in a suit against a partnership.

In *Foster v. Hill*, 55 Mich. 540, the bill was filed by the widow and some of the heirs of a deceased person against another heir to set aside a deed executed by the deceased in his life-time, on the ground that it had been obtained by fraud and forgery. Held, that the parties were excluded from testifying as to matters equally within the knowledge of the deceased.

In *Schratz v. Schratz*, 35 Mich. 485, it was held that the statute applies where the knowledge which the deceased had was proved through letters passing between the parties; and it was held, further, that counsel had a right to cross-examine, to ascertain fully with reference to such matters testified to which were equally within the knowledge of the deceased party, and might then move to strike out the whole of such testimony because incompetent under the statute. The testimony elicited on cross-examination is the testimony given in behalf of the party calling the witness.

In *Brown v. Bell*, 58 Mich. 58, it was held that this statute did not apply to proceedings to probate a will, on the ground that until the will was probated there was no representative of the deceased, and no one who could be called an opposite party to such representative. The same doctrine was held in *Schofield v. Walker*, 58 Mich. 96.

In *McClintock's Appeal*, 58 Mich. 155, it was held that proceedings upon distribution of the estates of deceased persons did not come within the section of the statute, and that all the heirs might be compelled to testify; that it was in effect a suit between the distributees, who each represented his own interest.

In *McMillan v. Bissell*, 63 Mich. 66, the bill was filed by the executors of the last will of Hugh Moffat, deceased, against the daughter and son-in-law of the deceased.

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The daughter was the residuary legatee of one share he had left, and the son-in-law was also a legatee, so far as the share should be applied to an indebtedness due from him to the estate. Held, that they could not testify to any fact equally within the knowledge of the deceased while living.

In *Stackable v. Stackable's Estate*, 65 Mich. 515, it was held that a married woman, who had a husband living, who had boarded the deceased, was not entitled to the money due for board, and could not present a claim therefor against the estate without an assignment from her husband; and that she was an assignee within this statute, which precludes assignees from testifying to facts within the knowledge of the deceased party.

In *Buffum v. Porter*, 70 Mich. 623, the bill was brought against a purchaser from the heirs of a deceased person. Held, that complainant was not a competent witness.

In *Hillman v. Schwenk*, 68 Mich. 297, held, that the testator's personal property vests in the executor for the purpose of administering the estate; and that, where suit was brought upon a note which the defendant claimed belonged to the deceased party at his death, and the executor indemnified the defendant, and took upon himself the defense of the suit, the plaintiff was disqualified from testifying; and held, also, that legatees and devisees do not represent the estate in the prosecution or defense of suits.

In *Taylor v. Bunker*, 68 Mich. 258, plaintiff brought suit against an administrator. Held, that the testimony was not rendered admissible by the fact that other parties were present and had knowledge of the matters testified to equally with the deceased.

In *Hood v. Olin*, 68 Mich. 165, the plaintiff claimed title to certain property as mortgagee under a mortgage by one Nead, and brought replevin against the firm of Ware & Olin. During the pendency of the suit Ware died. Held, that the statute did not prevent Nead from testifying to matters equally within the knowledge of Ware or the firm.

Bassett v. Shepardson, 52 Mich. 3, announces the general doctrine.

In *Singer Manfg. Co. v. Benjamin*, 55 Mich. 330, the action was replevin, brought against the defendant individually. Held, that defendant in replevin, under a plea of the general issue, could show that plaintiff had

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no right to possession when suit was commenced, and for this purpose could show that he was special administrator of a deceased person who was the owner of the goods at the time of his death; and, having shown that he defended in a representative capacity, a witness, who had been agent of the plaintiff corporation, was excluded from testifying to matters which, if true, were equally within the knowledge of the deceased, and which knowledge the witness acquired while he was agent.

In *Hillman v. Schwenk*, 68 Mich. 293, held that, in a suit brought to recover upon a note made payable to a person since deceased, indorsed by said deceased in his life-time, and which note, it was claimed, belonged to the deceased at the time of his death, and had been improperly obtained by the plaintiff, and where a legatee was assuming the defense, this fact did not prohibit the plaintiff from testifying as to matters equally within the knowledge of the deceased.

In *M'Cutcheon v. Loud*, 71 Mich. 433, plaintiff made a contract with one Gay, who was trustee for a firm of which he was a member. Gay died. Held, that plaintiff could not testify to the contract made with Gay, as the suit was brought against and defended by the surviving partners.

Lautenshlager v. Lautenshlager, 80 Mich. 290, 291, was a proceeding to probate what was claimed to be a will, and it was held that the statute did not apply to such proceedings.

In *Wilson v. Wilson's Estate*, 80 Mich. 472, Eliza Wilson presented a claim before the commissioners on claims in the estate of Helen Wilson, deceased. Held, that a daughter of the claimant was a competent witness to testify to matters equally within the knowledge of the deceased.

In *Lake v. Nolan*, 81 Mich. 115, it was held, in a controversy between an alleged grantee and a widow claiming her dower right, that the statute did not apply.

In *Barker v. Hebbard*, 81 Mich. 267, after the trial defendant died, and upon the second trial the plaintiff offered to introduce a stenographer's minutes of what plaintiff swore to on the first trial. Held excluded by the statute.

Jackson v. Cole, 81 Mich. 440, was not a suit wherein the representative of the decedent was a party to the record. Plaintiff sued defendant upon a claim against

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him, assigned to her by her husband in his life-time. Held, that she was a competent witness to testify to the assignment.

In *Lyttle v. Railway Co.*, 84 Mich. 298, held, that testimony of a party is admissible as to matters equally within the knowledge of an agent of a corporation, since deceased, if such matters testified about are also within the knowledge of any surviving officer or agent of the corporation.

There certainly is nothing in these authorities to support the contention that Croul is a competent witness to testify to matters which were equally within the knowledge of Philinda Hurlbut, because he claims these bonds as an executor of the estate of Chauncey Hurlbut, deceased.

If this reasoning is to prevail which is claimed by the defendant's counsel, we have a case prosecuted and defended by the representatives of deceased persons, where the statute says the opposite party shall not be permitted to testify, and yet where they both can testify. The estate cannot testify. The estate is not supposed to be in possession of facts about which it can speak, even if permitted to by the statute. I always supposed that the estate of a deceased person is the property left by the person upon his death, and that the legal title to personal property vested in the executor or administrator, and that the person having the legal title to the property is the real party in interest. It is said that executors are merely agents of the estate, and not parties to the suit. If mere agents, and not parties, then death would have no effect to abate the suit; the party would be still before the court. But, as I read the statute, an agent, though sued, is not exempt from the prohibition of the statute. An agent may possess knowledge of facts which were equally within the knowledge of the deceased, and, if sued by a representative of the deceased as a

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party, he could hardly be permitted to testify to such matters by showing that he was an agent. Indeed, the deceased may have been his principal, and the suit may have arisen out of that relation.

The case of *Duryea v. Granger's Estate*, 66 Mich. 599, is relied upon to support the contention that Croul is a competent witness. The case was not reversed upon that ground. Two of the Judges merely concurred in reversing, without assenting to the reasons given for the reversal. That was a case of a claim presented against the estate of a deceased party. This is not.

Counsel for the defendant say in their brief that this "case may well be entitled '*The Estate of Philinda Hurlbut, Deceased, v. The Estate of Chauncey Hurlbut, Deceased.*'" There is no principle of pleading or practice which will authorize a cause to be so entitled, even if it had been against Jerome Croul, executor of the estate of Chauncey Hurlbut, deceased. Cases should be entitled with the names of the parties to the suit. In a suit brought by an executor or administrator, the administrator or executor is the party, and not the estate. The parties to the suit determine how the papers in the suit should be entitled, but the entitling never determines who are the parties. It would be a novel way to determine who is "the opposite party" under the statute by entitling papers in the suit in any particular name. Would a declaration which commenced with "The Estate of Philinda Hurlbut, plaintiff in this suit, files this declaration against the estate of Chauncey Hurlbut in a plea of," etc., bring any parties before the court? Is there any rule of pleading heretofore discovered that would sanction such pleading? Yet, in order to evade the statute, and build up a fictitious construction, the estate must be invested with an entity, and called a

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party to the suit, to let in the representatives of the deceased to testify, when the statute plainly forbids it! Where the suit is between representatives of deceased parties the statute prohibits both of those representatives from testifying; yet, under this construction, by a strange metamorphosis, both can testify simply by calling the suit one between two estates! Croul, as executor, is not a mere nominal or disinterested party. If the property belongs to him as executor, he is really the party possessed of the legal title. Does the statute permit him, even if he is so invested with the legal title, and is seeking to defend it, to testify to facts which were in the knowledge of the deceased party, who, in her lifetime, claimed to own the property, and whose administrator is seeking to recover it for her, and whose title Croul is disputing.

Before proceeding to the determination of the competency of the witnesses, it is necessary to consider the character in which the parties to this suit stand before the court. It is claimed that the question of the competency of the witnesses should be considered as if the suit were instituted against Jerome Croul in his representative capacity as executor of the last will of Chauncey Hurlbut. But I do not accede to this proposition. According to his own testimony, he must have received these bonds in his individual capacity, before he was appointed executor, and before the will was admitted to probate. If the bonds were the property of Philinda Hurlbut, it can make no difference how he regarded them. It is possible that she might, after he had collected the avails from the United States, and turned them into the estate, have maintained an action for money had and received against him as executor, so as to be reimbursed out of the assets of the estate. *De*

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Valengin's Admrs. v. Duffy, 14 Pet. 282; *Baring v. Putnam*, 1 Holmes, 261; *Conger v. Atwood*, 28 Ohio St. 134. The general rule is that, where the executor does some act or makes some promise after the decease of the testator, he is chargeable in his individual capacity, and not as executor. The exception is limited to cases where the transaction which constituted the cause of action arose in the life-time of the deceased. Such is not this case. The transaction which constitutes the cause of action here arose after the decease of Chauncey Hurlbut, and is based upon a contract of bailment between Jerome Croul and Philinda Hurlbut. As a general rule, a bailee cannot dispute the title of bailor, but it is a defense to an action brought against him by the bailor for non-delivery of the subject bailed that it was taken by or delivered to a person having paramount title and right of possession. In such case the burden of proof is upon the bailee. In this case Jerome Croul, the individual, and Jerome Croul, as executor of the last will of Chauncey Hurlbut, deceased, are two distinct persons in the law. One represents Jerome Croul, the individual, and the other represents the estate of Chauncey Hurlbut, deceased. It was just as competent for him to show in defense for not delivering these bonds that they belonged to him as executor, as it would have been to show, if such had been the fact, that they belonged to the Preston National Bank. Although that defense was open to him, and he was not shut out from it in this case, yet he, *as executor*, was no more a party to the suit than would the Preston National Bank have been had he sought to show that he had delivered the bonds to it on demand, and that it had the paramount title and right to the possession thereof.

The important issue in the suit was, in whom was the paramount title? and this should be borne in mind in

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testing the competency of the witnesses to testify in this cause. The plaintiff, as administrator of the estate of Philinda Hurlbut, claimed the paramount title, which was delivered through an executed gift of the bonds by Chauncey Hurlbut to Philinda Hurlbut. The defendant claims that the paramount title was in the executor of the last will of Chauncey Hurlbut. Individually he made no claim to the bonds, but denied his liability as bailee. Neither in this suit did the estate of Chauncey Hurlbut claim the bonds. Jerome Croul individually made the claim that he had delivered the bonds to the executor of Chauncey Hurlbut's estate.

The statute referred to reads as follows:

"That when a suit or proceeding is prosecuted or defended by the heirs, assigns, devisees, legatees, or personal representatives of a deceased person, the opposite party, if examined as a witness on his own behalf, shall not be admitted to testify at all to matters which, if true, must have been equally within the knowledge of such deceased person." How. Stat. § 7545.

This suit is prosecuted by plaintiff as the representative of Philinda Hurlbut, deceased, against Jerome Croul in his individual capacity; and, as he is the opposite party, he is excluded by the plain terms of the statute. A judgment in this case will not bind the assets of the estate of Chauncey Hurlbut in the hands of the executor, and cannot be collected by the plaintiff out of such assets. He was therefore not a competent witness to testify to matters equally within the knowledge of Philinda Hurlbut. *Yerkes v. Blodgett*, 48 Mich. 211; *Downey v. Andrus*, 43 Id. 65; *Bassett v. Shepardson*, 52 Id. 3.

Bachelder v. Brown, 47 Mich. 366, is cited as supporting the contention of the defendant. That case holds that where an executor brings suit upon negotiable paper, and a third person claims the paper, and takes upon himself the defense of the suit upon that ground, such

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third person is deemed an opposite party to the executor, and cannot testify to facts which, if true, must have been within the knowledge of the deceased. We adhere to the principle there asserted. It shows that, if it were true that the third party here, viz., Jerome Croul, as executor, and representing the estate of Chauncey Hurlbut, claims the bonds, and has taken upon himself, as such executor, the defense of the suit, he is not a competent witness to testify to any facts which, if true, were equally within the knowledge of Mrs. Hurlbut. The mistake which it seems to me the counsel for the defendant make is the assumption that Jerome Croul is not the real party defendant, when in point of fact and law he is. As before stated, if he could have been made liable as executor (which is at least doubtful), the plaintiff having elected to proceed againt him individually, he is bound by the election, and defendant must respond in damages, unless he, as an individual, can show he has delivered the bonds to a person who has a title paramount to that of the administrator.

Mrs. Williams was a competent witness for the plaintiff. The suit was not defended by the personal representatives of a deceased party. This disposes of the errors assigned.

The defendant was permitted to introduce any competent testimony tending to show that the bonds in question belonged to the estate of Chauncey Hurlbut, and also that he had always treated them as belonging to the estate; that he had included them in his inventory, and had accounted for both principal and interest to the estate. The estate is not yet closed, and if he has acted under a mistake of fact it is presumed it may be rectified.

The court instructed the jury that the plaintiff must establish the fact claimed by him that the bonds in

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question were given by Mr. Hurlbut to his wife, Philinda Hurlbut, and delivered to her, by a preponderance of evidence, and that the burden of proof was upon the plaintiff upon that issue; and in conclusion he said:

"If you believe from all the evidence that these bonds, at the time Mr. Hurlbut died, were found in the house, and given to Mr. Croul after his death,—were not the property of Mrs. Hurlbut,—then your verdict will be for the defendant. If you find from the evidence that they were the property of Mrs. Hurlbut at the time of Mr. Hurlbut's death, then your verdict will be for the plaintiff."

I think the judgment should be affirmed.

McGRATH, J., concurred with CHAMPLIN, C. J.

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CHARLES G. HUNTINGTON v. CHARLES G. PARKHURST.

Landlord and tenant—Agreement for a lease—Tenancy at will—Yearly holding—Notice.

1. The relation of general tenancy at will cannot be terminated by either party without notice to the other; and the tenant cannot, without justifiable cause, abandon the premises, and treat it as a surrender, without giving the notice required by the statute.
2. A tenant at will, until the tenancy is legally terminated by notice, is bound to pay for the use and occupation, and the mere vacating of the premises during the term, or while the tenancy exists, will not exonerate him from such payment.
3. Where the purchaser of a stock of goods went into possession of the store building in which they were contained under a verbal agreement with the owner to execute to the purchaser a written lease of the premises for a term of one year, with the privilege of three or five years, at an agreed yearly rental, payable in monthly installments, which lease the purchaser agreed to accept and enter into, and without any other agreement or understanding occupied the store for two months,

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and paid the stipulated rent, such action is held to have converted the holding into a tenancy of one year at all events, with an additional term, depending upon the election of the lessee, as to which he was a tenant at will from year to year.

Error to Ingham. (Person, J.) Argued July 2, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Q. A. Smith (*A. D. Prosser,* of counsel), for appellant.

A. B. Haynes (*Montgomery & Lee,* of counsel), for plaintiff.

[The points of counsel are stated in the opinion, where the authorities are discussed.—REPORTER.]

CHAMPLIN, C. J. This action was commenced before a justice of the peace to recover for the use and occupation of certain premises before then claimed to have been leased by the plaintiff to the defendant. The plaintiff had judgment before the justice, and the case was appealed to the circuit court, and there, after hearing the testimony, the court directed a verdict for the plaintiff.

We quote, with a few amendments, the statement of facts taken from the supplemental brief of counsel for defendant, namely:

The plaintiff was the owner of a store building, in which was contained a stock of goods which had been attached, and which was sold by the sheriff at public auction, and purchased by the defendant. When the goods were offered for sale, the plaintiff informed the auctioneer, and he so announced, that any purchaser of the stock of goods might obtain a lease of the store. Immediately after the purchase by the defendant, the plaintiff and he talked together with reference to leasing the store, and it was then agreed between them that the plaintiff would execute to defendant a written lease of

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the premises for a term of one year, with the privilege of three or five years, for a yearly rental of $500, payable monthly, in installments of $41.66. The defendant agreed to accept and enter into such a lease on those conditions, and on account of the lateness of the hour the plaintiff said he would have the lease drawn after he returned home, and they could execute it at some future time. Without any other agreement or understanding. defendant occupied the store two months, and paid the monthly rental of $41.66. The defendant, through his father, during this period of time, requested the plaintiff to execute the lease, who replied that he would do so, but that, the defendant not being present to execute the lease with him, he would have it drawn so that when they came together it could be signed.

The term commenced on the 6th day of May, 1890, and the rent was paid to July 6, 1890. On the 3d day of July the defendant removed from the premises. On the Sunday before, he had an interview with the plaintiff, in which he told him that he was going to vacate, to which the plaintiff replied that he had rented the store for a year. The defendant, after he had removed from the premises, locked the door, and left the key in a bank with which plaintiff was connected, with directions to deliver it to plaintiff. Plaintiff refused to accept the key or the possession of the premises, and, after the next month's rent became due and payable, brought his action to recover for the use and occupation of the premises.

The first question to be decided is, what was the nature and extent of defendant's holding under the facts above stated? The question so ably argued by defendant's attorney in his original and supplemental briefs, and orally before the Court, namely, that the testimony shows that no actual lease was entered into, but that there was an agreement for a lease for a term of one year, with the privilege of three or five years, at an annual rental of $500, payable monthly, at the rate of $41.66, does not reach and dispose of the merits of the controversy. The terms of the lease were agreed upon, and it was agreed that they should be reduced to writing. This

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doubtless was an agreement for a lease to be executed according to the terms agreed upon; but the testimony shows further that the defendant went immediately into possession under the agreement that he should have a written lease for one year, with the privilege of three or five years, as above stated, and occupied the premises and paid the stipulated rent for two months. Under such facts, the relation of landlord and tenant was created. The defendant became a tenant at will.

It is laid down by Taylor, in his work on Landlord and Tenant (section 60), that—

"Where a party enters into the possession of premises under an agreement to accept a lease for 20 months, and subsequently refuses to accept the lease, he becomes by such refusal a strict tenant at will, for he may be ejected immediately; but, if the landlord accepts rent from him monthly, or according to the terms of the original agreement, a general tenancy at will is created, commencing from the time of entry;" and "while a man who enters under a void lease is strictly a tenant at will, if he pays rent he becomes a general tenant at will or from year to year, according to circumstances."

In this case the agreement for a periodical rent, and the agreed term of a year, at all events, makes the holding of defendant a tenancy from year to year. See Tayl. Landl. & Ten. § 56, and cases cited in note 2.

Counsel for defendant claim that an entry under an agreement for a lease is a mere license, and can be terminated by either party before the written lease is executed, and cited Tayl. Landl. & Ten § 37. The author does make use of the expression that "such an agreement, however, will operate as a license to enter upon the premises agreed to be demised;" but it was not the intention, as I think, of the author, to convey the idea that a person so agreeing for a lease might enter and occupy the premises, and pay rent in accordance with the agreement, without becoming a tenant. The distinction

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is this: If he enters awaiting the execution of the agreement, his entry is one under a license, but if, after being in possession of the premises, he pays rent for the use of them in accordance with the agreement which was to be reduced to writing, his relation is that of a tenant at will; and the distinction is plainly pointed out at the close of the section cited, where the author says:

"Any person, however, who may be in possession of land in pursuance of an agreement to let, may, by the payment of rent or other circumstances, become a tenant from year to year."

Indeed, it would seem not to require any citation of authorities to prove that when a party, under an agreement for a lease, enters into possession and pays rent for the use of the premises, the relation between the parties cannot be other than that of landlord and tenant; it certainly is not that of licensor and licensee. The tenant has acquired rights of which he cannot be divested without the proper notice, and so has the landlord.

The same result follows where a lease is made by parol for a longer term than one year, which it is agreed shall be reduced to writing, and the party enters into possession under it, and pays rent, as where a lease is made for a longer term than one year by parol, and is void under the statute of frauds, and the tenant enters and occupies, paying rent; and is ruled by the same principles which apply to the latter class. In such cases it has been uniformily held that an implied tenancy from year to year will arise in cases where occupation is had under a parol demise for more than a year, void because exceeding the period allowed by the statute of frauds. Tayl. Landl. & Ten. § 56.

Some cases hold that such a lease, although void for the period beyond a year, is good for one year, because it will be presumed that the parties intended to effect

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the lease for the term for which one could legally be made; but I think the better reasoning is that a contract which is void by the terms of the statute of frauds is not good for any purpose further than to indicate what the intentions of the parties were with reference to the terms of the letting. The rights of the parties must be judged by the relation they have assumed with each other independently of the void contract. Courts, however, have referred to the contract as throwing light upon the intentions of the parties, and it has been generally held that, where a tenant enters and occupies under a parol lease for more than a year, the agreement may be looked to as showing the terms under which the tenancy subsists, in all respects, except as to the duration of the term. *Doe v. Bell,* 5 Term R. 471; 1 Cruise, Dig. 281–284; *People v. Rickert,* 8 Cow. 226; *Schuyler v. Leggett,* 2 Id. 660; *Greton v. Smith,* 33 N. Y. 245; *Clayton v. Blakey,* 8 Term R. 3; *Laughran v. Smith,* 75 N. Y. 205.

In the case last cited, which was an action to recover rent, Andrews, J., said:

"But although a parol lease for more than a year is void, yet it has long been settled that, when the tenant enters and occupies, the agreement regulates the terms on which the tenancy subsists, in all respects, except as to the duration of the term. It is a reasonable inference in such case, from the circumstances, that the parties intended a tenancy on the terms of the original agreement, and the law implies a new contract between the parties corresponding therewith, so far as it is not in conflict with the statute."

In *Koplitz v. Gustavus,* 48 Wis. 48, the tenant had gone into the occupation of the premises under a lease which was void under the statute of frauds. It was contended by counsel for the lessee that—

"As the lease was not in writing, and was for a longer period than a year, it was void; that the rent reserved was not annual, but monthly, payable at the end of

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each month, on the plaintiff's demand; and that under these circumstances the tenancy created by holding over was one from month to month, and determinable by 30 days' notice."

The court, in deciding the case, after stating the position of counsel, said:

"But to this it may be answered that there are well-considered cases which decide, under the English statute and statutes which contain similar provisions, that while a parol lease for more than the prescribed period creates, in the first instance, only an estate at will, yet such estate, when once created, may, like any other estate at will, be converted into a tenancy from year to year, by payment of rent or other circumstances which indicate an intention to create such yearly tenancy."

In *Morrill v. Mackman*, 24 Mich. 279, the distinction between a license and a tenancy is clearly pointed out, and it was expressly held that a parol lease for more than a year, reserving an annual rent, under which the lessee had been put into possession, although invalid under the statute of frauds, was good as a lease from year to year, until terminated by notice. The principle in this case was cited with approval and applied in *Coan v. Mole*, 39 Mich. 454.

Schneider v. Lord, 62 Mich. 141, was a case where there was an unwritten lease for two years from the beginning of the year 1884. The rent was paid monthly for more than a year, and the lessee claimed the right to terminate the lease on a month's notice. The case below was decided on the ground that the tenancy was at will from month to month, and ended by a month's notice to quit. It was, however, held that it was a tenancy from year to year, and not a monthly tenancy at will, and the fact that the rent was payable monthly did not any the less make it a contemplated yearly holding.

In the case at bar the contemplation of the parties was that the holding should be at all events for one

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year, and with an additional term, depending upon the election of the lessee, and as to this he was a tenant at will from year to year, and not from month to month.

If, however, it should be conceded that the tenancy was at will from month to month, still the judgment below was correct. The principles of justice and sound policy require that estates at will should not be terminated except at the will of either party, and then not without notice. This principle was long since embodied in our statutes, which, with some recent modifications in respect to notice (Act No. 162, Laws of 1885), read as follows:

"How. Stat. § 5774. All estates at will or by sufferance may be determined by either party by three months' notice given to the other party; and, when the rent reserved in a lease is payable at periods of less than three months, the time of such notice shall be sufficient if it be equal to the interval between the times of payment; and such notice shall not be held void by reason of its mentioning a day for the termination of the tenancy not corresponding to the conclusion or commencement of any such period, but in any such case the notice shall be held to terminate the tenancy at the end of a period equal in time to that in which the rent is made payable. And in all cases of neglect or refusal to pay rent on a lease at will or otherwise, seven days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease. And in all cases of tenancy from year to year a notice to quit, given at any time, shall be sufficient to terminate said lease at the expiration of one year from the time of the service of such notice."

The entry of defendant into possession under the terms of the agreement for a lease before it was executed, and paying rent in accordance with the agreement, created the relation of general tenancy at will, which could not be terminated by either party without notice to the other; and the tenant cannot, without justifiable cause, abandon the premises, and treat it as a surrender, with-

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out giving the notice required by the statute. *Walker v. Furbush*, 11 Cush. 366; *Whitney v. Gordon*, 1 Id. 266; *Thomas v. Nelson*, 69 N. Y. 118; *Batchelder v. Batchelder*, 2 Allen, 105; *Schuyler v. Smith*, 51 N. Y. 309; *Koplitz v. Gustavus*, 48 Wis. 48.

The record does not show that defendant had any justifiable cause for abandoning the premises. They were not in fact or law surrendered. Vacating the premises before the expiration of the term, and offering the key, which is refused, is not a surrender. The testimony shows that defendant paid rent to July 6, vacated the premises July 3, and on the Sunday previous, namely, June 29, told the plaintiff he should move out, and plaintiff insisted that the store was rented for a year. Aside from the question whether notice given on Sunday would be valid, it plainly appears that it was entirely insufficient to terminate the tenancy, even if the holding was from month to month, and it follows as a natural consequence that until the tenancy is terminated the defendant is liable for the use and occupation of the premises.

The position is taken by counsel for the defendant that a tenant going into possession under a void lease cannot be compelled to pay rent for any longer period than he actually occupies, and in support of that position the case of *Thomas v. Nelson*, 69 N. Y. 118, is relied upon, and the following syllabus of that decision is cited:

"It seems that a parol lease, void under the statute of frauds because for a longer period than one year, is not valid for that period. If the tenant enters and occupies under it, he may be compelled to pay for the use and occupation, but cannot be compelled by virtue of the lease to pay for a longer period than he actually occupies."

The facts of that case are stated in the opinion. The

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plaintiff alleged a lease for seven years. On the trial he proved a memorandum made by himself in which he stated that he was to give Mr. Nelson a lease of the building 271 Broadway for seven years, the first three years at $1,400 a year, and four years at $1,500 a year. It was said that the memorandum did not embody the contract between the parties, and was not intended to. It simply embraced the main features of the lease, and plainly indicated that a formal lease was subsequently to be executed embodying the agreement which the parties had made. The plaintiff was permitted to show a parol agreement for a lease of seven years, and the terms upon which the parties had agreed. The court ruled upon the trial below in his charge to the jury that such a lease, although invalid for a term of seven years, was valid for a term of one year. Under these rulings there was no exception, and Mr. Justice Earl, in delivering the opinion of the court of appeals, said:

"While such a contract is void, yet, if the tenant enters under it and occupies, he may be compelled to pay for the use and occupation of the premises [citing authorities]; but it is difficult to perceive how such a contract, declared to be void by the statute, can be held to be valid for a single hour, or upon what principle a tenant entering under a void lease could be compelled, by virtue of the lease, to pay for a longer period than he actually occupied."

This probably is the language from which the syllabus was composed, but a further reading of the opinion will disclose that what the court meant by actual occupation was an occupation under the tenancy, and until it had been legally terminated; for in the next clause the court proceeds as follows:

"In August the defendant moved away from the premises, and sent the keys of the house to the plaintiff in a letter, and they were not returned. He claimed upon the

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trial that the retention of the keys was an acceptance of the surrender of the premises. The plaintiff was not bound to seek the defendant, and tender a return of the keys. The court held that the mere retention of the keys, which were sent to him without his request or assent, did not of itself amount to a surrender and acceptance, and in this there was no error."

So that it plainly appears that a tenant at will, until the tenancy is legally terminated by notice, is bound to pay for the use and occupation, and that the mere vacating of the premises during the term, or while the tenancy exists, does not exonerate him from the payment for the use and occupation of the premises until the relation of landlord and tenant is legally terminated.

The judgment must be affirmed.

The other Justices concurred.

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LOIS MCCARTY, ADMINISTRATRIX, v. CLARISSA A. FISH.

[See 81 Mich. 460.]

Will—Life-estate—Vested legacy—Condition.

1. A wife, after providing a life-support for her husband from the income, and, if necessary, by the use of her entire estate, bequeathed $500 of the residue to his niece, in consideration of her care and assistance towards the testatrix and her husband, to be performed during their natural lives; which provision is held not to be in terms a condition, but rather an expression of the reason or inducement for the legacy, which vested on the death of the testatrix, subject to being divested in case the entire estate was required for the husband's support.
2. A wife willed her entire estate to her husband, for and during his natural life-time, to be used by him in defraying his necessary expenses, and provided that, if the income was

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insufficient for that purpose, he might use so much of the principal as might be necessary, and that, if there was any property left after paying said expenses, certain legacies should be paid therefrom, and the remainder, if any, was bequeathed to a daughter. And it is held that the husband did not take the whole estate absolutely at the death of the testatrix, but a life-support, to be furnished from the income, if sufficient, and, if not, by the use of so much of the principal as might be necessary for that purpose.

Error to Jackson. (Peck, J.) Argued June 4, 1891. Decided July 28, 1891.

Assumpsit. Plaintiff brings error. Reversed, and judgment entered in this Court for plaintiff. The facts are stated in the opinion.

Grove H. Wolcott, for appellant.

Lewis M. Powell, for defendant.

LONG, J. This is an action in *assumpsit,* brought by plaintiff to recover a bequest of $500 to Hattie McCarty, contained in the will of Alvira Palmer, deceased.

The declaration is upon the common counts. Defendant pleaded the general issue.

It appears that an application for administration of the estate of Hattie McCarty, deceased, was made to the probate court of Jackson county, by the plaintiff, who is the mother of Hattie McCarty, in 1889, in which the above bequest was stated to be the only property of the deceased in such county. The petition was denied by the probate court upon the ground that there was no property to administer; and upon an appeal to the circuit court the order of the probate court was affirmed, holding that there was no estate in the county of Jackson belonging to the said Hattie McCarty at the time of her death. Upon the appeal to this Court in that cause the orders of the

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circuit and probate courts were set aside, and it was held that property rights could not be adjusted upon application for administration. *In re McCarty*, 81 Mich. 460. Since the above decision, plaintiff has been appointed administratrix, and as such seeks in this action to recover the said bequest of $500, which is now held by the defendant.

Alvira Palmer, aunt of Hattie McCarty, made her last will February 26, 1879, and two days thereafter executed a codicil to the same, whereby defendant became sole residuary legatee. At or about the date of the execution of the will Hattie McCarty took up her residence with Alvira Palmer, the testatrix, and her husband, Reuben Palmer, and continued to care for and assist the two until the death of Alvira Palmer, which occurred on the 5th day of February, 1880. She then remained with and cared for Reuben Palmer until the 28th day of July, 1880, at which time, on account of illness, she went to her mother's home in Wayne county, N. Y., where she remained until her death, August 8, 1881. A short time after going to the state of New York she received from Reuben Palmer the following letter:

"JACKSON, MICH., 12, 1880.

"*My Dear Niece Harriet:* We received your letter, and was sorry to hear that you was not any better. I am up and down as usual. Now, Harriet, you know that Bennett has served an injunction on Frank, and I can get no money, and Bennett says he will spend a thousand dollars but what he will have that collected; so you see I can't get any money until that is settled. So you see now, Harriet, I have made up my mind not to keep house any more. You shall have that $500 just the same as if you took care of me the rest of my life-time.

"REUBEN PALMER."

It appears that Reuben Palmer, the husband of the testatrix, died on March 16, 1886. The estate of Alvira

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Palmer at her decease consisted of a real estate mortgage executed by one Frank Eggleston, of the value of $3,000, and only the interest of this sum was used by Reuben Palmer for his support. The estate of Elvira Palmer has been settled, and all the bequests paid, according to the terms of her will and codicil, by the executor, except the one to Hattie McCarty, which was delivered to defendant as residuary legatee.

The only questions raised upon this record for our consideration are:

1. By the terms of the will, did Reuben Palmer take the whole estate absolutely at the death of his wife?
2. If he took but a life-estate, did the bequest of Hattie McCarty become vested, so that at the death of Reuben Palmer she would be entitled to receive it?

The provisions of the will to be considered are as follows:

"*First.* I do give, devise, and bequeath all the estate and property, whether real, personal, or mixed, and wheresoever the same may be situate, that I may own or be possessed of at the time of my decease, to my beloved husband, Reuben Palmer, for and during his natural life-time, to be used by my said husband, Reuben Palmer, during his life-time in defraying his necessary expenses; and, should the income of said property not be sufficient for that purpose, then he is to use so much of the principal as may be necessary. Should there be any property left after the paying of the expenses of my said husband, Reuben Palmer, then, in that case, after his death, I do will and dispose of the property remaining in the manner following, to wit:

"*Second.* I do will and bequeath to the beloved niece of my said husband, Hattie McCarty, the sum of $500, in consideration of her care and assistance towards myself and my said husband, to be performed by her to us during our natural lives."

By the third clause of the will the testatrix gave her son Martin the sum of $1,000, and, by the fourth clause, to her son Warren the sum of $500. The defendant in

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this case, a daughter of the testatrix, was made the residuary legatee. Upon the hearing in the court below, the court directed verdict in favor of the defendant.

It is contended by counsel for defendant that Reuben Palmer, under the will, had the right to the possession and control of the mortgage, and might collect the same and use the whole of it for his own purposes during his life-time; and that, therefore, he was vested with the absolute interest in the mortgage, instead of a life-interest merely, so that there was nothing to pass to Hattie McCarty by the second clause of the will. We do not think this position well taken. He was to have the property for and during his natural life, to be used in defraying his necessary expenses. The will must be construed as a whole, and it was evidently the idea of the testatrix that the income from the property would be sufficient to meet the necessary expenses of her husband during the term of his natural life, as she provided for two of her sons after the death of her husband, as well as Hattie McCarty, and she also made disposition of the residue of her estate. The son Martin was appointed executor under the will, and was entitled to the control and possession of the assets of the estate, with the right, however, to Reuben Palmer, should his necessary expenses require it, to use any part of the principal sum.

In *Schehr v. Look*, 84 Mich. 263, the testator gave to his executors power to sell any or all personal or real estate of which he should die seised and possessed, as they should deem proper, and invest the proceeds; and he gave to his wife during the term of her natural life the use, income, and profit of all his property, real, personal, and mixed, of every nature whatsoever. By a subsequent clause of his will he gave all the remainder and residue of his estate to his six children. It was held by this Court that the testator intended to give his wife

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only the use of the estate, and did not intend that she should have possession and control of the body of the estate; distinguishing that case from *Sutphen v. Ellis,* 35 Mich. 446; *Jones v. Jones,* 25 Id. 401; and *Proctor v. Robinson,* 35 Id. 291.

In the present case, Reuben Palmer was not appointed executor of the will. The execution of the will was intrusted to the son Martin, who was also made a legatee. It is therefore quite apparent that the interest which Reuben Palmer was to have was limited to the use of the estate during his life-time, except, in the event of his necessities requiring it, that he should have the right to use the principal sum. There is no ambiguity or uncertainty in this first clause. It is of all the property, for and during his natural life-time, to be used during his life-time in defraying his necessary expenses, with the right to use so much of the principal as might be necessary, in case the income should be insufficient. It was clearly the intent of the testatrix that the interest which her husband should take was only the use and enjoyment of it during the term of his natural life, and the remainder over to her children and to Hattie McCarty.

In *Larned v. Bridge,* 17 Pick. 339, the clause of the will construed was as follows:

"I give and bequeath to my beloved wife the use and benefit of all my estate, real and personal, and, should the income prove insufficient for her comfortable support, she to dispose of so much thereof as shall be necessary for that purpose; and at her decease I order the remainder to be equally divided among my children."

It was held that this was not in the nature of a legacy, and vested in the widow an estate for life, with the naked power to sell only in case the income should be insufficient.

Upon the second point it is contended by counsel for

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defendant that the legacy to Hattie McCarty had not become vested in her at the time of her death, and consequently the plaintiff can take nothing in this suit. It is conceded by him in his brief that, if the legacy was vested in Hattie McCarty at the time of her death, then the plaintiff would be entitled to recover, if Reuben Palmer only took an estate for life. The contention is that the legacy did not vest, for the reasons:

1. That it was given upon the condition that she should care for and assist the testatrix and her husband during their natural lives, which is a condition precedent to the vesting of the legacy.
2. That it was to be taken only upon the consideration being performed, which was never performed, that the legatee should care for the testatrix and her husband during their natural lives.

The general rule is that all estates under wills, in the absence of any provision to the contrary, are to take effect or become vested at the decease of the testator; and, where the instrument contains words, in regard to any estate created by it, limiting the period of enjoyment to some future time after the decease of the testator, it may then become a question whether the vesting of the estate is intended to be delayed, or only the time for the present enjoyment. It may safely be affirmed that the English as well as the American cases establish the following propositions:

1. It is competent for the testator in terms to direct whether the estate over shall vest or not; and, when this is done, all construction is excluded.
2. Where there is reasonable ground for saying that upon the whole it is just to suppose that the testator expect a devisee or legatee over to take a vested interest, the court will so construe the bequest.
3. No estate will be held contingent unless very decisive terms of contingency are used in the will, or it is necessary to hold the same contingent in order to

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carry out the other provisions and implications of the will.

The mere fact that one estate under a will is provided to take effect after the termination of the intervening one will not have the effect to prevent both estates becoming vested at the moment of the decease of the testator, the one in possession, the other in prospect or remainder.

It will be found that the question of vesting or remaining contingent depends upon whether the condition of the intervening estate determining and the estate over taking effect is one that must happen some time, and so as to give effect at some period to the second estate, or may never happen. If the former, then the second estate in remainder will always be regarded as vested, but in every case where the existence of a secondary estate is dependent upon a contingency which may never happen, or never happen so as to allow the vesting of the secondary estate, then the devise or bequest must be regarded as contingent as well in its character as in regard to the time when it will come into operation. The courts have generally manifested a disposition so to construe the language of devises and legacies as to favor the vesting of all the estates attempted to be created. The fact that the testator makes no provision in regard to the disposition of the estate, providing the event named for a devisee or a legatee coming into full possession never occurs, is regarded as satisfactorily showing that it was not in the mind of the testator to create a contingent estate.

In *Eldridge v. Eldridge*, 9 Cush. 516, Shaw, C. J., defines the rule of construction upon this subject thus:

"When, therefore, words are equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself or to the time of payment, courts

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are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent."

In *Dingley v. Dingley*, 5 Mass. 537, Parsons, C. J., states the rule as follows:

"For it is a rule of law that a remainder is not to be considered as contingent when it may be construed consistently with the testator's intention to be vested."

In *Smith's Appeal*, 23 Penn. St. 9, it was said:

"The law favors an absolute, rather than a defeasible, estate; a vested, rather than a contingent, one; a primary, rather than a secondary, intent."

In *Letchworth's Appeal*, 30 Penn. St. 175, it was held that the law always inclines to hold the whole interest in property as vested, rather than contingent; and therefore, in case of doubt, it declares the interest vested.

In *Childs v. Russell*, 11 Metc. 16, the will contained the following clause:

"After the payment of my just debts, funeral expenses, and money legacies, I will and order my executor, hereinafter named, to vest in stocks, or keep at interest, all the rest, residue, and remainder of my personal estate, to raise a fund out of which the annuity to my said beloved wife is to be paid during her natural life; and, after her decease, should she survive me, I will and order that all the rest, residue, and remainder of my estate, real, personal, or mixed, and of whatsoever name or nature, shall be divided among my heirs according to law, excepting the share which will by law descend to my daughter Elizabeth."

Upon this clause, the testator's wife having survived him and received her annuity while she lived, it was held that the time of distribution only, and not the right to the distributive share, was postponed until after the decease of the wife. It was contended in that case, as

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in this, that the whole fund might be exhausted, and that, therefore, it was such a contingency as would prevent the vesting of the legacy; and the chief justice remarked:

"It was a suspension of the distribution and payment for an ascertained time; but in the mean time we think the right to the distributive shares vested in the heirs, to take effect in enjoyment upon the decease of the widow, an event certain in itself, and contingent only in respect to the time it should happen."

When there is doubt whether the words of contingency or condition apply to the gift itself or to the time of payment, courts are inclined to construe them to apply to the time of payment, and to hold the gift rather as vested than contingent. *Toms v. Williams*, 41 Mich. 552.

Under the second point counsel for defendant contends that the bequest to Hattie McCarty was not only contingent upon there being any property left at the death of Reuben Palmer, but was upon condition that she should care for and assist the testatrix and her husband during their natural lives, and that it falls within the rule that, where a devise is made upon a condition to be performed or paid by the legatee, the legacy will not vest until the condition is performed. It will be observed, however, that the testatrix made no provision in the will for the share of the estate bequeathed to Hattie McCarty should she fail to perform this claimed condition,—that is, to care for and assist the testatrix and her husband during their natural lives,—except by the residuary clause.

It appears to me that it was the intent of the testatrix in the present case that her husband, Reuben Palmer, should be supported out of her estate during the

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term of his natural life, and, if the income from her estate was insufficient for that purpose, that the whole or any part of the principal sum might be used for his support and maintenance; that, if anything should be left of the estate, Hattie McCarty was to have $500, the son Martin $1,000, and the son Warren $500; and if, after the payment of these legacies, anything remained, it should go and belong to the daughter, Clarissa A. Fish, the defendant in this case. The fact that her husband might use the whole of it in his support and maintenance during his life-time would not prevent the vesting of the legacy in Hattie McCarty, subject, however, to be divested if the contingency happened that her husband's necessities required the use of the whole of the principal sum. This would apply as well to the two sons, who were given legacies by the third and fourth clauses of the will.

The contention that Hattie McCarty was to have $500 only on condition, and for the consideration of her care and assistance towards the testatrix and her husband, to be performed by her during their natural lives, we think has no force. The language used is not in terms a condition, but rather, as asserted by counsel for plaintiff, an expression of the reason or motive or inducement for making it, as there are no words of forfeiture in the gift, and nothing to indicate a different disposition of the money in case Hattie McCarty should fail to care for and assist the testatrix and her husband during their natural lives.

We are of opinion, in reading the whole will, that this legacy vested in Hattie McCarty at the time of the decease of the testatrix, and that the court was in error in directing verdict and judgment for the defendant.

The judgment of the court below must be reversed,

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and judgment entered in this Court for the amount of the legacy, with interest from the time demand was made upon the residuary legatee for its payment. The plaintiff will recover the costs of both courts.

The other Justices concurred.

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WILLARD M. POTTER v. JOHN HUTCHISON MANUFACTURING COMPANY (A CORPORATION).

[See 79 Mich. 207.]

Summons—Issue in blank.

There is no reason why the mere filling out of a summons by an attorney after it is signed and sealed by the clerk, where no abuse is shown, should vitiate the writ.

Error to Eaton. (Hooker, J.) Argued June 4, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

Thomas A. Wilson, for appellant.

Huggett & Smith, for plaintiff.

McGRATH, J. This suit was commenced by summons, to which defendant pleaded in abatement that the writ was signed, sealed, and delivered to the attorney for plaintiff in blank, and did not, when so delivered to said attorney, contain either the name of the parties, a statement of the cause of action, the amount of damages, date of issue, or the day of the return. Plaintiff

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demurred to this plea, the court below sustained the demurrer, and defendant appeals.

The issue of writs in the manner complained of is not unusual. Indeed, the practice is general, and with the knowledge and consent of courts. Attorneys are officers of the court, and are subject to its summary jurisdiction. They are, as has been said, as essential to the successful working of the court as the clerks and sheriffs, and perhaps as the judges themselves. They are, for the convenience, not only of themselves, but of the other officers of the court, clothed with certain privileges, an abuse of which would be visited with severe punishment. They have access to files and records, they draft all orders and decrees, and generally enter rules and motions. There is no reason why the mere filling out of a summons by an attorney after the signature of the clerk, where no abuse is shown, should vitiate the writ.

In *Caldwell v. Estell*, 20 N. J. Law, 326, it was held that the clerk might permit an attorney to make out a transcript, and affix the signature of the clerk and seal of the court to the certificate required by law, where the clerk himself could truly certify to the matter set forth; it appearing that such had been the practice, with the sanction of the court.

It is contended that "if an attorney may do what was done here, there can be no compliance with the law relative to the payment of the county fee before commencement of suit, since the attorney may issue a process at a distance from the clerk's office, and, if he fails of service, the clerk will never know that the process was issued," and that "the statute of limitations may be defeated by dating the summons back."

These objections are imaginary, rather than real. It is not contemplated that writs are to be signed and sealed without reference to the immediate commencement of

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suit. It is usual for the attorney of plaintiff to file with the clerk a *præcipe* or order, directing such process to be issued against the defendant as the nature of the case may require. The *præcipe* should specify the court, the names of the parties, the kind of action, the kind of writ, when it is to be made returnable, and the amount of the debt or damage. Some entry or memorandum is usually made by the clerk of the commencement of the suit, and this is necessary, whether the writ is filled out before or after the signature of the clerk. One of the first things done by the clerk is to assign to the cause a file number, and the first entry upon the calendar is a record of the issue of the writ, and the date of such issue. It does not appear here that such entry was not made, or that the county fee was not paid, or that the *præcipe* was not filed. The statute provides that, before the delivery of the writ to any officer to be executed, it "shall be subscribed or indorsed with the name of the attorney, solicitor, or other officer by whom the same shall be issued" (How. Stat. § 7290), so that the writ is incomplete in any case when it leaves the clerk's hands.

The judgment is affirmed, with costs. The record will be remanded, and the defendant allowed the usual time in which to plead over, if it desires.

The other Justices concurred.

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SIDNEY S. SMITH v. JOSEPH ABAIR.

Husband and wife—Ownership of wearing apparel.

A husband has a sufficient title to the wearing apparel purchased by his wife with his money to enable him to maintain replevin against an officer who seizes it upon a tax warrant in satisfaction of a tax assessed against the wife upon her separate property.

Error to Saginaw. (Edget, J.) Argued June 4, 1891. Decided July 28, 1891.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

Harris & Kendrick, for appellant.

Trask & Smith, for plaintiff.

MCGRATH, J. This cause was commenced in justice's court, and appealed to the circuit court, where plaintiff had judgment.

The defendant, who was marshal of the village of Carrollton, received a tax warrant running against plaintiff's wife, for the collection of a tax amounting to $21 or $22, and under this warrant he seized and took away a long list of articles of personal wearing apparel belonging to Mrs. Smith. Some of this had been purchased by her prior to the marriage, and others had been purchased after marriage, in the ordinary course of purchases by the wife.[1] The replevin is brought by the husband only as

[1] Mrs. Smith testified as follows: "All the articles replevied in this suit were purchased with money furnished by my husband. Some of the least valuable articles I may have purchased without consulting my husband, but anything that amounted to much I always consulted my husband about buying, and he would furnish me the money to buy it with. He furnished all the money with which the clothes were purchased that were replevied in this suit."

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to such articles as were purchased after the marriage. The balance of the property, purchased by the wife before the marriage, was treated as her separate property, and was left in the hands of the marshal.

The main question is whether the husband has the title to the wife's wearing apparel so that he can maintain replevin, as between himself and the marshal.

The learned circuit judge before whom the cause was tried filed a written opinion, in which he said:

"The statutes of the State have made no change in the common-law rule that the obligation to furnish the wife with her wearing apparel, the same as in the case of a man with minor children, is imposed upon the husband still, and, as in the case of a man with minor children, the wearing apparel belongs to the husband, as between himself and a third person who undertakes to remove it."

We fully concur in that opinion. If the articles of clothing and personal ornament appropriated for the wife are purchased with the husband's money, or upon his credit, the fact that they are selected or purchased by her, and are intended for her personal and exclusive use, does not render them any the less his property, as against third persons. He may insure it as his own property, and it cannot be that the law imposes an obligation upon him to furnish or restore it, and that he cannot prevent its taking upon an execution running against his wife. The purchase of the property for her use is no more a gift to her than is the purchase of apparel for a minor child such a gift to that child as would divest the parent of a right to recover it from a third person.

The statute of distribution of estates of intestates, re-enacted since the married woman's act, provides that the widow shall be allowed all her articles of apparel and ornaments. This would indicate that, without such a provision, these articles would constitute a part of deced-

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ent's estate, and would be liable, as such, to be sold for the payment of his debts. *State v. Hays,* 21 Ind. 288; *Hawkins v. Railroad Co.,* 119 Mass. 596; *Curtis v. Railroad Co.,* 74 N. Y. 116; *State v. Pitts,* 12 S. C. 180; *Pratt v. State,* 35 Ohio St. 514.

The judgment is affirmed, with costs.

MORSE, LONG, and GRANT, JJ., concurred with MCGRATH, J.

CHAMPLIN, C. J. I concur in the result.

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HARVEY J. TAYLOR, ADMINISTRATOR, ETC., v. WASHINGTON I. TAYLOR ET AL.

Demurrer—Appeal.

A demurrer to a supplemental bill to reform and foreclose a mortgage, which fails to allege a want of equity in the bill, and assigns as grounds of demurrer that the complainant has not made or stated a case which entitles him to file the bill, or any bill in the nature thereof, or a case which entitles him to the relief prayed for, does not contain a sufficient statement to be treated as a general demurrer to the bill for want of equity.

Appeal from Oakland. (Moore, J.) Argued June 4, 1891. Decided July 28, 1891.

Bill to reform a mortgage, and to foreclose the same. Defendant Washington I. Taylor appeals from order overruling demurrer. Appeal dismissed, and appellant allowed 60 days in which to answer. The facts are stated in the opinion.

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Aaron Perry, for complainant.

Elliot R. Willcox, for appellant.

LONG, J. This bill was filed to reform a mortgage as to the description of the lands incumbered, and to correct a mistake in such description.

The mortgage was given March 25, 1887, for $2,109, to be paid in three years, at 6 per cent. It was given to Burgoyne Jones in his life-time, and the mistake, if one was made in the description, was not discovered until after his death. It is claimed by the bill that the mortgage as written covers less than 4 acres of the land intended to be conveyed, and that it was intended to cover 56.95 acres, including the four acres named in the mortgage. The value of the land described is about $150, while the land intended to be described is claimed to be worth the full amount of the mortgage, and that the mistake occurred from inadvertence of the parties and of the scrivener who drafted the mortgage.

The defendant Washington I. Taylor answered, admitting the making of the mortgage and note, but denying that any mistake was made in the description of the premises. Defendant Annie Taylor also answered, denying that it was intended that the mortgage should cover the 56.95 acres, and averring that 40 acres of this land was a homestead, and that she had never executed any mortgage which she intended should incumber the homestead. The township of Avon was defaulted for want of an answer.

An order was entered in the case to take proofs in open court, and the cause placed on the calendar for hearing, but before proofs were taken Annie Taylor died, March 27, 1890. On April 9 following, application was made to the court by defendants' solicitor to suggest

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of record the death of Annie Taylor. On the same day application was made by the solicitor for complainant for leave to file a supplemental bill, to the effect that, since said cause had been at issue, said mortgage had become due and payable, and was yet unpaid, for the purpose of foreclosing the mortgage in the same bill, and also to allege the death of Annie Taylor, and the extinguishment thereby of all her rights, and those of her personal representatives, as to any homestead interest which she might have had therein; and that the cause continue without abatement as to the surviving defendants upon filing of such supplemental bill. An order was granted by the court upon this application, allowing the cause to proceed without abatement, and the filing of the supplemental bill, reciting the facts, and that the cause proceed solely against the surviving defendants. On April 10 the supplemental bill was filed, and served on the defendant Washington I. Taylor, to which he filed demurrer. In the mean time John R. Taylor was duly appointed administrator of the estate of Annie Taylor, and presented his petition setting forth the death of Annie Taylor, and his appointment, and claiming that the lands still continued as a homestead to her husband and children, who still occupy them as such, and asking for the revival of said suit as to Annie Taylor. On December 15, the order was granted by the court reviving the cause as to Annie Taylor, and permitting her administrator to stand in her stead. On the same day an order was made by the court overruling the demurrer of Washington I. Taylor. From this order overruling the demurrer the defendant Washington I. Taylor appeals to this Court.

The causes of demurrer are as follows:

1. That the said supplemental bill is filed with a

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change of the title of the cause without an order of the court authorizing such change, omitting, as it does, the name therefrom of the defendant Annie Taylor.

2. That the said supplemental bill does not continue Annie Taylor, or her legal representatives, a party defendant in said cause, although she appeared in said cause, and filed her cross-bill with her answer, as provided by rule 123, alleging important interests and defenses to the claims of said complainant, and asking in said cross-bill affirmative relief.

3. That said supplemental bill, by its allegations as to the rights and interests of Annie Taylor and her representatives, and the relief therein prayed for, seeks to adjudicate and bar her said rights, without making her, or her legal representatives, defendants therein.

4. That said Annie Taylor, or her legal representatives, is a necessary defendant in said cause, and said bill of complaint makes neither of them such defendants.

5. That said supplemental bill seeks to introduce an entirely new and distinct cause of action from that claimed by complainant in his original bill filed in said cause, and is in no way in aid of said original complaint, and is not supplemental thereto.

6. That the maturing of the mortgage referred to in said supplemental bill, after filing the original bill, as is claimed in the former, is not the happening of such subsequent events as warrants in chancery the filing of said supplemental bill.

7. That said complainant in his said bill has not made or stated a case which entitles him to file said supplemental bill in said cause, or any bill in the nature thereof, or a case which entitles him to the relief therein prayed for.

How. Stat. § 6737, permits parties who may think themselves aggrieved by an order overruling a general demurrer to appeal therefrom. Prior to this statute, which was passed in 1883, no appeal was allowed from an order overruling a demurrer; but this statute was not intended to allow appeals from such orders, unless the demurrer is general. *Babcock v. McJury*, 76 Mich. 316; *Shaw v. Chase*, 77 Id. 436.

It is claimed by counsel for the defendant that the

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court was in error in overruling this demurrer, and that an appeal will lie to this Court for the reason that, while special causes of demurrer are set up and alleged, yet the seventh clause of the demurrer may be treated as a general demurrer to the bill for want of equity.

We need not pass upon the question whether the demurrer should be treated as general as well as special, and therefore properly appealed from, or whether we should consider the question of the general demurrer so connected with special causes of demurrer, as an examination of what is termed the general demurrer in the seventh clause does not satisfy us that it comes within the definition of a general demurrer. A general demurrer is one going to the merits of the case intended to be made by the bill, and when no particular cause is assigned, except a formula required by the practice or rules of the court, that there is no equity in the bill, and is always proper where the bill is defective in substance. In the present case the only claim made by the seventh clause is that the complainant has not stated a case which entitled him to file said supplemental bill, or a bill in the nature thereof, or a case which entitled him to the relief therein prayed for. The supplemental bill, as it is framed, asks the aid of the court in reforming the mortgage, and also for foreclosure, and we think sets up sufficient matter which, if true, would entitle the complainant to the relief asked for, not only in the correction of the mistake, but for foreclosure of the mortgage.

But, even if this did not appear in the bill, the seventh allegation does not contain sufficient statement to entitle it to be treated as a general demurrer to the bill for want of equity. It does not allege that there is no equity in the bill, but is aimed at the question that the complainant is not entitled to file a supplemental bill in

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the cause, and that the supplemental bill does not state a case upon which the complainant would be entitled to relief.

The appeal from this order must be dismissed. The defendant may have 60 days within which to file his answer to the bill, if he so elects. Complainant will recover the costs of this Court.

The other Justices concurred.

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ANTOINETTE T. SANSCRAINTE v. CECELIA TORONGO.

Ejectment—Identity of premises—Evidence—Adverse possession.

1. Where land is described as lying in a given direction from a certain creek, and in latter deeds as lying in a like direction from a specified river, the identity of the two streams may be shown for the purpose of showing the identity of the land so described.
2. In an ejectment suit involving a disputed boundary, evidence of the statement by the defendant's husband, in her presence and without dissent on her part, that, if he had notified plaintiff to make her half of the division fence, she would not have allowed him to move it from the old line, and for this reason he did not give such notice, but made the change at his own expense, is admissible, and warrants the inference that the fence was moved at the instance of the defendant, who claimed title on the trial to the lands inclosed with her own by such removal.
3. Adverse possession of land, up to a marked boundary, for 80 years, establishes the right of the occupant to the premises so occupied, although his original entry may not have been under any title or claim of title.
4. Evidence of general reputation that the land occupied by a plaintiff in ejectment, who seeks to establish title by adverse possession, was claimed to be owned by him, is admissible; citing *Sparrow v. Hovey*, 44 Mich. 63.

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Error to Wayne. (Hosmer, J.) Argued June 5, 1891. Decided July 28, 1891.

Ejectment. Defendant brings error. Affirmed. The facts are stated in the opinion.

George H. Prentis, for appellant.

Hoyt Post, for plaintiff.

LONG, J. This is an action of ejectment brought in the circuit court for the county of Wayne, where, upon a trial before a jury, the plaintiff had verdict and judgment. Defendant brings error.

The declaration is in the usual form under the statute, claiming the fee of the land. The land is in the township of Ecorse, Wayne county, and is about 8 feet wide on the southerly end, and 14 feet on the northerly end, and 588 feet in length. The controversy grows out of the question as to the true location of the boundary line between the parties to this record.

The declaration describes the land in controversy as situate in the township of Ecorse, county of Wayne, State of Michigan, known and described as follows:

"A strip of land fronting on the 'St. Cosme line road,' (so called), 8 feet in width on said road, and extending in a northerly direction from the north line of said road 588 feet, and being 14 feet in width on the north or rear end of said strip of land, off from the west side of a certain piece or parcel of land described as follows, to wit: Situate on the south end of private land claim No. 114, beginning at a post standing in the south line of said claim (called the 'St. Cosme Line'), the corner on said line of lands formerly owned by James Cicotte and Francis Cicotte; thence running north, 70 degrees 30 minutes west, on said line, 8.64 chains, to a post, the corner of lands belonging to the estate of T J. Campau, deceased; thence north, 29 degrees east, along a fence, the present east boundary of said estate, 11 chains, to the center of the north branch of the River Ecorse;

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thence south, 52 degrees 25 minutes east, down the center of said river, 6.60 chains; thence north, 29 degrees east, 8.40 chains, to a post in the north edge of the marsh bordering said river; thence south, 61 degrees east, 2.51 chains, to the west line of land formerly owned by Francis Cicotte; thence south, 29 degrees west, along said west line, 15 chains, to the place of beginning; containing 9.69 acres of land,—as per the report made by the commissioners on partition appointed by the judge of probate for the county of Wayne in the matter of the estate of Simon B. Rousseau, deceased, filed with the said judge of probate on the 12th day of May, 1876, and by him approved and confirmed on the 13th day of May, 1876, recorded on page 97 of Liber 104; which said premises the said plaintiff claims in fee."

The declaration alleges that on or about the 16th day of August, 1888, the defendant entered upon said premises, and ejected the plaintiff therefrom, and unlawfully withholds from the plaintiff the possession thereof. The plea was the general issue.

The plaintiff, to maintain the issue on her part, offered in evidence a deed from Charles Larabelle and wife to Simon B. Rousseau. This is a deed of warranty, and bears date October 12, 1830, and describes the premises as follows:

"A certain tract or portion of land on the south-west side of Mill creek, on the back part of his farm, and being part of the farm which the said Charles purchased of James Cicotte, and comprehending the whole of the land of said farm lying south-west of said Mill creek, and containing 8 or 10 acres, be the same more or less."

To the introduction of this deed in evidence objection was made by defendant's counsel, for the reason that it did not describe the land in controversy in this suit. It was admitted in evidence by the court upon the statement of counsel for plaintiff that it would be shown that it did cover the land in controversy. To this ruling defendant excepted.

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Plaintiff then offered in evidence a report of the commissioners on partition in the estate of Simon B. Rousseau. This report was also objected to by defendant's counsel, upon the ground that it did not describe the lands in controversy. This report was received in evidence upon the statement of counsel that it covered the lands in controversy. It appeared from this report that the commissioners partitioned the land described in the proceeding among the children of Simon B. Rousseau, by which partition it is claimed the plaintiff, who is a daughter of Simon B. Rousseau, had partitioned to her the lands described in the declaration in this cause. The land described in this report is as follows:

"All the certain parcel of land situate on the south end of private land claim No. 114, beginning at a post standing in the south line of said claim (called the 'St. Cosme Line'), the corner on said line of lands formerly owned by James Cicotte and Francis Cicotte; thence running north, 70 degrees 30 minutes west, on said line, 8.64 chains, to a post, the corner of lands belonging to the estate of T. J. Campau, deceased; thence north, 29 degrees east, along a fence, the present east boundary of said estate, 11 chains, to the center of the north branch of the River Ecorse; thence south, 52 degrees 25 minutes east, down the center of said river, 6.60 chains; thence north, 29 degrees east, 8.40 chains, to a post in the north edge of the marsh bordering said river; thence south, 61 degrees east, 2.51 chains, to the west line of lands formerly owned by Francis Cicotte; thence south, 29 degrees west, along said west line, 15 chains, to the place of beginning; containing 9.69 acres of land."

The plaintiff claims that the property described in the declaration is a part of the property set off to her by the report of said commissioners. The estate of Simon B. Rousseau was administered and closed.

The plaintiff's testimony tended to show that her father, Simon B. Rousseau, took possession of the lands described in the Larabelle deed some time prior to the

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year 1849; that he worked the lands, and had sole and uninterrupted control and possession of them, from that time up to the year 1875, at the time of his death; that his possession was open and notorious during all those years; and that at his death, after the partition proceedings were had, the plaintiff went into immediate possession of her portion of the Rousseau lands, and that she has continued in possession thereof ever since. It appears, further, that in the year 1849 Joseph Campau was the owner of the lands adjoining the premises in controversy upon the west; that in the year 1849 one Hubert Champagne leased these lands from Joseph Campau; and that, before his going upon the Campau premises, a rail-fence had been erected on what was called the line between the Rousseau lands and the lands of Joseph Campau. The claim of the plaintiff is that this rail-fence occupied the true boundary line between her father's lands and the Campau lands, and that from that time forward the fence continued upon that line up to the year 1888, at which time the defendant in this suit and her husband removed it, and erected a board fence, starting at a point 8 feet east of the rail-fence at the south end, and at the St. Cosme line road, and running north to a point 14 feet east of the rail-fence at the north end, and inclosing with the defendant's lands the lands in controversy in this suit; that this was done without plaintiff's knowledge or permission. That a better view of the premises and their position may be had, the following map is inserted:

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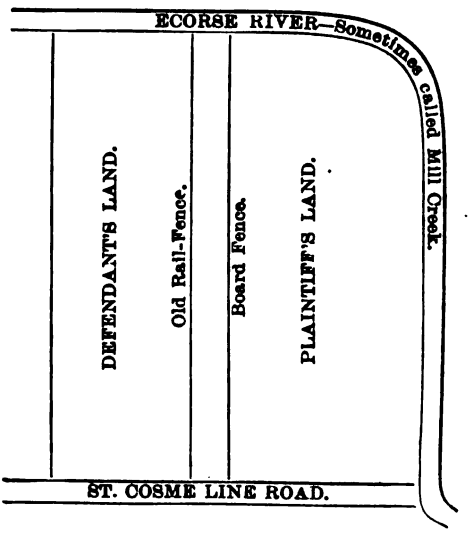

The defendant's claim upon the trial was that the plaintiff's proofs failed to show ownership in plaintiff's father to the lands in controversy, and that the only claim that plaintiff asserted was by occupancy; that the deed from Larabelle and the probate proceedings did not show title in the plaintiff; and that the court was in error in holding that 15 years' possession, without any title and claim of right, would make title in the plaintiff. The defendant also sought to show upon the trial that the board fence erected in 1888 was on the true line between the Rousseau and Campau lands. For that purpose she put in evidence a deed made by Augustus T. Chapaton and wife to the defendant, dated August 29, 1885. This deed described lands as follows:

"That portion of lot No. 11 of the subdivision of private claim No. 114 described as follows, to wit: Beginning at a point in the westerly line of said lot where said westerly line intersects the center line of the

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'St. Cosme Line Road' (so called); thence easterly, along the center line of said St. Cosme line road, to the easterly line of said lot No. 11; thence northerly, along the easterly line of the said lot No. 11, to the center line of 'Pepper's Road' (so called); thence westerly, along the center line of said Pepper's road, to the westerly line of said lot and claim; thence southerly, along the said westerly line, to the place of beginning,—it being the intention to convey all that portion of said lot lying between said St. Cosme line road and the Pepper's road, containing 5.53 acres, be the same more or less."

The defendant called as a witness Mr. E. J. Goodell, a surveyor, who gave testimony tending to show that private claim No. 114 was divided into 11 lots several years ago; that he knew the land claimed by defendant in her deed, and, about a year before the trial of the cause, had surveyed it out; and that the board fence stood upon the easterly line of defendant's land. This surveyor claims to have found the original stake at the south-west corner of private claim 114, and to have taken that as a starting point in making his surveys; and that, starting at that point, the board fence was put upon the true boundary line between plaintiff's and defendant's lands. Defendant also introduced testimony tending to show that at the time Mr. Champagne occupied the Campau tract of land, in 1865, the rail-fence was moved from about where the board fence now stands, westward upon the Campau tract, from 6 to 12 feet, for the purpose of cleaning up the brush in the fence corners, and that Mr. Rousseau assisted in moving the fence over. Defendant also offered in evidence deeds tracing the title of the Campau lands from Joseph Campau, through A. T. Chapaton, to the defendant. Defendant also introduced testimony tending to show that after Hubert Champagne moved off the Campau lands, in 1865, Simon B. Rousseau rented the Campau lands, and became a tenant under Campau of those lands for several years subsequent thereto; and that,

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while he was such tenant, he moved the rail-fence from its true line over upon the Campau lands, to the point where the witnesses for the plaintiff claimed the old rail-fence stood.

Plaintiff introduced a great many witnesses upon the trial, who testified positively that they had known these premises from 25 to 35 and 40 years and upwards, and that during all that time the old-rail fence had stood uninterruptedly, up to the year 1888, upon a line now claimed by the plaintiff to be the line between the lands of the parties to this cause, and that it was the same fence that was torn down and removed by defendant's husband.

The plaintiff was called as a witness in her own behalf, and testified that they put the board fence inside and upon her possessions, and that at that time the defendant cultivated the lands and claimed them, although no one was living upon the lands. She was then asked by her counsel:

"What have you heard the defendant say with reference to the moving of that fence?

"*A.* She didn't say much, but her husband did,—her husband, in her presence."

Counsel for defendant objected to what defendant's husband said, and the witness was permitted to answer under his objection and exception, and answered as follows:

"He said that, if he had notified me to make my half of the fence, I would not have let him move the fence from the old line; therefore he did not notify me, but put up the whole fence at his own expense and work; and, moreover, if he had minded what one of the neighbors said, he would have taken more yet."

Plaintiff also introduced testimony tending to show that the lands described in the Larabelle deed are the same lands described in the declaration, and that the

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Ecorse river was formerly known in the earlier days as "Mill Creek," and that the Mill creek described in the deed is the same stream of water now known as the "Ecorse River;" and the plaintiff testified, as a witness upon the stand, that the parcel of land described in the Larabelle deed is the same parcel as described in the partition proceedings in her father's estate, and that it is the same land which she now occupies, and is described in the declaration.

At the close of the testimony, the defendant asked the court to instruct the jury as follows:

"2. Possession for 15 years and upwards, unless it is by virtue of some title and claim of right, and the possession is open, notorious, and hostile to the opposite party or the party in possession, will not entitle a party to a verdict.

"3. A line or boundary fence, standing in a certain place for 15 years and upwards, does not make a line, and does not bind the parties in interest, unless it is on the correct line, unless the parties assent to it as the correct line, or unless they occupy on the respective sides, claiming it to be correct.

"4. If Simon B. Rousseau changed the fence, or caused the fence to be changed, while he was a tenant of Joseph Campau, the plaintiff cannot recover.

"5. Putting up a fence by a man who owns land on one side of a correct line, and who occupies the land on the other side as a tenant of the owner, will not establish a line, and will not enable the person who puts up the fence to hold the land by possession."

The court instructed the jury as follows:

"If you find that the line fence has not been disturbed until the time which has been testified to by the plaintiff and the plaintiff's witness, then, gentlemen of the jury, you might infer from the testimony which was given by the plaintiff or one of her witnesses that the husband of the defendant said in her presence that he had moved it, and yet, if he had followed his neighbor's advice, would have taken something more, you may infer from that statement that it was moved at the instance of the

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defendant, and under those circumstances the plaintiff would be entitled to recover. * * * * * * *

"If you find that the fence has been removed since 1864, then unless you find that it was held by the plaintiff and her father for more than 15 years in adverse possession, and that the possession of herself and father was open, notorious, and hostile, and under claim of right, why, then, gentlemen of the jury, she would not be entitled to recover, if you find the true line of lot 11 ran at any other point. In other words, I charge you, as requested by defendant in this case, that possession for 15 years and upwards, unless it be by virtue of some title or claim of right to the possession, open, notorious, and hostile to the opposite party or the party in possession, will not entitle the party to a verdict. I charge you, also, that a line or boundary fence, standing in a certain place for 15 years and upwards, does not necessarily make a line, and does not bind the parties in interest, unless it is on the correct line, unless the parties either acquiesced in it or assented to it as the correct line, or occupied their respective sides, claiming it to be correct. I charge you, also, that if Simon B. Rousseau moved the fence, while he was a tenant of Mr. Campau, over onto the property of Mr. Campau, the statute of limitation could not run so long as that tenancy continued; and unless he claimed after the termination of that tenancy and held possession under claim of title, and unless such possession was open, notorious, and hostile, the plaintiff could not claim any right under such possession. So that it comes down to this, gentlemen of the jury: If you find that the father of the plaintiff, and the plaintiff after the death of her father, occupied the piece of ground which was given to her by her father, and you find that the fence which divided the property from the property now owned by the defendant in this case stayed there for fully 15 years prior to the time it was removed by the defendant, if you find that it was removed by the defendant, and the plaintiff and her father occupied that property under claim of title, and that such occupation was open, was notorious, was hostile, and, when I say hostile, I mean adverse to all other persons,—why, then, gentlemen of the jury, under those circumstances, the moving of the fence would be a tort on the part of the defendant, if she did cause the fence to be moved, and, under such

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circumstances, the plaintiff would be entitled to recover; but, unless you find these facts, then, under those circumstances, the verdict will be for the defendant."

At this point in the charge counsel for defendant asked the court to charge that,—

"Even if the fence stood there 15 years, and the adjacent owner acted on the supposition that the fence was on the correct line, unless it appears that they occupied on the respective sides of it, claiming it to be accurate, the plaintiff cannot recover."

To that request the court responded:

"That is true, gentlemen of the jury; but when I say, 'claiming it to be correct,' does not necessarily mean that it is claiming it to be the true line,—that is, the true line of lot 11,—but claiming it to be the accurate division between the properties."

Defendant's counsel thereupon requested the court further to charge the jury—

"That there is no evidence that there was any claim on the part of Mr. Rousseau at any time that this fence stood on the correct line; no claim on the part of Mr. Rousseau and the adjacent owner, or any of Mr Rousseau's heirs or grantees, so far as the evidence shows. I simply say this: There is no evidence here tending in the slightest degree to show that Mr. Rousseau ever claimed that this fence was on the correct line."

To this the court responded that,—

"The evidence of Mr. Champagne was that, in 1849, he went to work there and moved the old fence which was there over onto the correct line, as he said."

The counsel for defendant then remarked to the court:

"If the fence was put there, it was put where the board fence now is, and it has been moved since; but that does not make any difference, because the proposition is this: That Mr. Champagne had no right to fix the line for Mr. Campau, and Mr. Champagne, a tenant, fixing the line, and Mr. Rousseau fixing the line, even if they agreed to it,—but there is no evidence that they agreed to it,—would not establish a line."

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To which the court responded:

"There is no question that a tenant would have no implied authority to fix a line for the landlord, but at the same time where the line was fixed by the tenant, and where the line stayed there, fixed by acquiescence at least of the other party, between the tenant and the other party, and the line stayed there, if the other party acted upon it, and held open, notorious, and hostile possession of all that was beyond it, why unquestionably it would be fixed so far as the landlord is concerned. * * * * In this case, if you believe the testimony of the plaintiff's witnesses in that regard that he held up to that fence, that it was established between himself and Mr. Champagne, why it would be fixed, whether it was fixed by adverse possession, or whether it was fixed by actual agreement, or by acquiescence."

Some 20 errors are assigned upon this record. But few of them, however, are discussed by defendant in his brief, and he says he does not care to trouble the Court with some of the errors assigned, as he does not deem them important, after a more careful examination.

The 1st, 2d, 3d, and 5th assignments of error relate to the admission in evidence of the Larabelle deed and partition proceedings in the Wayne probate court, and the testimony of the plaintiff to identify the land described in the Larabelle deed as the land described in the partition proceedings and in the declaration. We think this evidence was competent. It is certainly competent to show that what is now called the "Ecorse River" was formerly known as "Mill Creek," and the description in the Larabelle deed is of a tract of land on the south-west side of Mill creek, and is a part of the farm which Larabelle purchased of James Cicotte, and comprehending the whole of the James Cicotte farm lying south-west of Mill creek. If Ecorse river and Mill creek are identical, it will be observed, from the plat heretofore set out, that the lands claimed by plaintiff as lying south-west of Ecorse river, being the premises described in the declara-

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tion, are identical with the lands described in the Larabelle deed as lying south-west of Mill creek. Mr. Bartlett, a surveyor who made the partition in the Rousseau estate, as one of the commissioners, testified that he located this very parcel of land, which he calls "Netty's Point," from the Larabelle deed; that he took the south part of the Larabelle farm, lying south and west of the creek, as inclosed, and made the measurements according to the inclosure, and himself made the description in the partition; that he had been on the premises again the same morning that he gave his testimony, and identified the premises by the new fence and the track of the old fence. Other witnesses also testified to the location of these lands in reference to the Ecorse river, formerly known as "Mill Creek." There was no error in receiving this testimony for the purpose of this identification. The lands were not only known and described as lands lying south-west of Ecorse river, but as lying south-west of Mill creek, and Ecorse river and Mill creek are conclusively shown to be the same stream.

The sixth and eighteenth assignments of error relate to the ruling of the court in permitting the plaintiff to testify to what the defendant's husband said to her about moving the old line fence, and the instruction of the court to the jury that they might infer from such statement that the fence was moved at the instance of defendant. The evidence was admitted upon the claim that it was justified by the fact that defendant was present when it was said. We think this evidence was competent, and the court was not in error in directing the jury that they might infer from this statement that the fence was moved at the instance of defendant. The defendant was present at the time of the statement, and, so far as shown, made no claim but that the fence was moved by

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her husband with her knowledge and with her assent; and she made no claim upon the trial but that it was moved there with her approbation by her husband, but, on the contrary, claimed the premises westward of the fence, and between that and where the old rail-fence stood. If she did not consent to her husband moving the fence over upon the plaintiff's lands, it was her duty, when plaintiff made claim to the lands, to disclaim any interest in them. Instead of that, she is now claiming title and ownership of the very lands which her husband inclosed with her lands by the building of this new board fence.

Defendants counsel further contends that the court was in error in modifying the second request to charge; that the request should have been given as presented; that possession for 15 years and upwards, unless it is by virtue of some title and claim of right, and the possession is open, notorious, and hostile to the opposite party or the party in possession, will not entitle the party to a verdict; and that the court was in error in modifying this request by adding, "or claim of right to the possession." Defendant's counsel contends that the plaintiff could only recover in this cause by reason of possession, coupled with some title and a claim of right. There was no error in this modification. The theory of the plaintiff was that her father went into possession under the Larabelle deed, claiming title to the lands now in controversy; that he used and cultivated them for more than 30 years, with a marked boundary between his lands and the Campau lands by this rail-fence, which stood there continuously and uninterruptedly from the year 1849 up to 1888; and that during all those years her father, and she after his death, used, cultivated, and occupied those very lands, claiming a right, not only under claim of

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title, but by open, notorious, and hostile possession as to all the world; and the court was not in error in modifying the defendant's request to charge, for, although the plaintiff's father may not have gone into possession under any title or claim of title, yet if he held the lands in controversy, and the whole of them, and used, occupied, and cultivated them, claiming a right thereto hostile and adverse to every other person, and he continued to occupy them for more than 30 years, up to the rail-fence, his rights in the premises became established by such adverse possession, although he may not have gone into possession under any title or claim of title at the time of his entry; but, as we have said, we think the plaintiff's testimony shows that the Larabelle deed and the partition proceedings sufficiently describe the lands mentioned in the declaration, and therefore plaintiff's father and plaintiff were occupying, using, and claiming rights in the premises, not only by adverse possession, but under a claim of title.

We think the court was not in error in modifying the defendant's fifth request, as he did in his general charge, which we have heretofore set out. If the fence was moved by plaintiff's father, in 1865, over upon the Campau lands as claimed, while he was a tenant of Mr. Campau, the court directed the jury that the statute of limitations would not run so long as that tenancy continued; and unless he claimed after the termination of the tenancy to hold the land by adverse possession under claim of title, and such possession and claim of title was open, notorious, hostile, and adverse, and had continued for more than 15 years after the termination of the tenancy, the plaintiff could not recover. There was no error

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in this instruction and modification of the request. The testimony abundantly shows that, after the tenancy had terminated, if one ever existed, a fence stood there for more than fifteen years prior to the time that the board fence was built, the plaintiff and her father occupying, claiming, and cultivating the lands during all that time.

Some claim is also made that the court was in error in permitting the plaintiff to introduce testimony by general reputation showing that these lands, up to the old rail-fence, were claimed to be owned by plaintiff and her father up to the year 1888. There was no error in this. *Sparrow v. Hovey*, 44 Mich. 63.

The seventeenth assignment of error relates to that part of the general charge of the court in which the court read to the jury from the case of *Stewart v. Carleton*, 31 Mich. 270. The claim is that the reading of what was said by Mr. Justice CAMPBELL in that case in reference to surveyors prejudiced the rights of the defendant, as it had reference to the survey made by the defendant's surveyor, Goodell, in locating, as he claimed to have done, the true boundary line between the parties. The plaintiff's case was not rested upon the question solely of the true boundary line, but was submitted to the jury principally upon the question of the established boundary in the year 1849, which had continued to be recognized and acquiesced in as the boundary between these lands from that time up to the year 1888, and we cannot see how the defendant's case could be prejudiced by the court reading from that opinion.

Taking the case as a whole, we are unable to discover any error. It appears to us, from the whole record, that the case was fairly tried, and the rights of the defendant fully protected under the charge of the court as given.

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The judgment must be affirmed, with costs.

MORSE, MCGRATH, and GRANT, JJ., concurred with LONG, J.

CHAMPLIN, C. J. I concur in the result.

HOMER W. NASH v. MARY E. BURCHARD AND MARTIN L. SWEET.

Equity—Accounting—Principal and surety—Will.

1. One who has acted as agent for another, and kept his own accounts, knows, if anybody does, how much money he has paid out, and what obligations he has assumed, in behalf of his principal, and what portion he has paid and discharged and what remains unpaid, and the account is not a mutual one; hence equity has no jurisdiction of a suit by the agent for an accounting.
2. A surety, who receives an agreed security for his indorsement of the principal's notes, cannot, until he has paid them, call upon the principal for any additional security, nor can he ask for any different contract for security than that which he originally received.
3. In order to secure a surety, the principal inserted an agreement in her will to pay to him upon her death $5,000, which she declared should be a first lien upon the estate she should leave at her death, and directed her executor to pay said sum to the surety out of *said* estate after paying her funeral expenses. And it is held that the provision in no way interfered with the disposition or use by the testatrix of any or all of the property she possessed when the will was made, and that the lien only attached to the estate remaining at her death.
4. Neither a contract creditor nor a surety can, by proceedings in equity, compel his debtor or principal to turn his property over to a receiver to secure a debt or satisfy it before obtaining judgment and exhausting his remedy at law.
5. It is competent for the first indorser to secure the second

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indorser, but the maker has no right to be subrogated to the place of a second indorser.

Appeal from Kent. (Grove, J.) Argued June 10, 1891. Decided July 28, 1891.

Bill for an accounting, and for a receiver. Complainant appeals. Decree dismissing bill affirmed. The facts are stated in the opinion.

E. S. Eggleston, for complainant, cited no authorities.

Uhl & Crane, for defendants, contended:

1. The complainant can have no relief against the express conditions of his own bond given for the purchase of goods. He does not allege incapacity, or illegality, or fraud or mistake of fact in its execution; citing *Fraser v. Fraser's Estate,* 42 Mich. 275, 281, 282.
2. The bill cannot be sustained as one to reach equitable assets. It does not show that the complainant has exhausted his remedy at law by the return of an execution unsatisfied; citing *Steward v. Stevens,* Har. Ch. 169; *Thayer v. Swift,* Id. 430; *Stafford v. Hulbert,* Id. 435; *Smith v. Thompson,* Walk. Ch. 1; *Maynard v. Hoskins,* 9 Mich. 485; *Tyler v. Peatt,* 30 Id. 68; *Preston v. Wilcox,* 38 Id. 578; *Vanderpool v. Notley,* 71 Id. 422; *Brock v. Rich,* 76 Id. 644; *Pierce v. Rich,* Id. 648.
3. The bill does not allege that Mrs. Burchard ever agreed to bequeath a legacy to complainant, and charge the same upon specific real estate, and therefore he has no lien growing out of a contract to make a provision for him by will. Such a contract would be within the statute of frauds, and revocable during the testator's life-time; citing *DeMoss v. Robinson,* 46 Mich. 62.
4. The bill does not show the death of the testatrix. The will is therefore ambulatory, and may at any time be altered or revoked by the testatrix during her life, and can only be operative at her death; citing 4 Kent, Com. 520.
5. The bill does not show that Mrs. Burchard ever agreed to secure the complainant for any sum whatsoever upon any property whatsoever; the complainant, therefore, does not show any lien arising out of the contract; citing *Kelly v. Kelly,* 54 Mich. 30, 47.
6. The will has not been admitted to probate, and is therefore

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ineffectual to pass either real or personal estate; citing How. Stat. § 5804; and until probated a will is without any fixed legal value as a will; citing *Allison v. Smith*, 16 Mich. 405, 429.

7 The complainant is not a legatee; he has only been named such in an instrument purporting to be a last will and testament, but the validity of which has yet to be determined; citing *McFarlande v. Clark*, 39 Mich. 44.

8. The testatrix is living, and therefore has no heirs, and it is beyond the jurisdiction of this Court to compel her to enter upon a contest with complainant, who can have no standing in court until after her death, and none then should the will be revoked; citing *Lloyd v. Chambers*, 56 Mich. 240.

9. The next of kin, heirs at law, and the devisees of Mrs. Burchard are not made parties, and are entitled to be heard, and nothing can be determined in regard to this will until they are made parties; citing same case.

10. If we should concede, for the sake of the argument, that the complainant was surety for Mrs. Burchard, he would not then be entitled to relief. His bill does not show that he has paid the judgment, and therefore as a surety he has no standing in court. A surety, upon the failure of his principal to pay or perform promptly, cannot compel him to turn over his property to a receiver to be applied to the satisfaction of his undertaking. The surety must first pay the obligation, and then sue for an idemnity; citing *McElroy v. Hatheway*, 44 Mich. 401, 402.

CHAMPLIN, C. J. This case comes before us upon demurrer to the complainant's bill.

The complainant is Homer W. Nash, of the city of Detroit, and he files this bill of complaint against the defendants, the principal statements contained therein being as follows:

1. That prior to the year 1882, and up to June 23, 1882, there had existed a firm known and called C. Burchard & Co., which was engaged in the business of making and vending men's clothing in the city of Grand Rapids, which firm was composed of Mary E. Burchard and Frederick Lyon; that the firm of Burchard & Co. sold out the business and stock in trade to the firm of Lyon & Gray, composed of said Frederick Lyon and Louis M. Gray; that the assets of the firm of Burchard

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& Co. at the time of the sale were as follows: Stock of merchandise then on hand, claimed to have been inventoried at the sum of $7,317.46, and good and collectible accounts to the amount of $2,406.71, and cash then on hand, $114.04,—which stock, accounts, and cash on hand were sold by the firm of C. Burchard & Co. to the firm of Lyon & Gray for the sum of $7,317.46, and a chattel mortgage upon the stock in trade was given by the firm of Lyon & Gray to Mary E. Burchard for that sum.

2. That there was afterwards paid upon the indebtedness to Mary E. Burchard the sum of $1,317.46, leaving a balance due and secured by the chattel mortgage of $6,000; that afterwards, in the month of March, 1884, the firm of Lyon & Gray became involved and unable to pay their debts, and made an assignment to Lyman D. Follett for the benefit of their creditors; that the assignee took possession of the stock, and caused it to be inventoried, with the fixtures in the store, which inventory made about the sum of $5,800; that within a few days thereafter Mary E. Burchard caused the stock of goods to be seized under and by virtue of her chattel mortgage, and caused the same to be sold thereunder at public auction in the city of Grand Rapids, which stock was sold for the sum of $2,600 to the complainant, Homer W. Nash.

3. That the said Lyon & Gray, in order to secure their indebtedness to their creditors, had given their notes and procured the indorsement of the same by the said Mary E. Burchard to the amount of $1,500, a part of which had been paid by the said Lyon & Gray, which left said indebtedness with her indorsement to the amount of about $900.

4. That, at the time of said sale by the firm of C. Burchard & Co. to Lyon & Gray, there were outstanding liabilities of C. Burchard & Co., for which Mary E. Burchard had given her individual notes, indorsed by Homer W. Nash, which were at that time unpaid.

5. That from the time of said sale by C. Burchard & Co. to Lyon & Gray, on or about the 23d of June, 1882, complainant had been acting as the friend, adviser, and assistant of the said Mary E. Burchard in her financial affairs, and at the time of the seizure of the said goods by the said Mary E. Burchard, under and by virtue of the chattel mortgage, it was arranged and agreed, by and between Mary E. Burchard and Homer W. Nash, that he

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should attend the sale, and, unless the property should be sold to other bidders for something near its value, that he, Nash, should bid in the same in his own name, but for the said Mary E. Burchard, in satisfaction, so far as it should go, of her said mortgage; that under the said arrangement Nash attended the sale, and bid in the property in his own name, but for the use and benefit of said Mary E. Burchard.

6. That the said Mary E. Burchard, being anxious to obtain employment for her son Frederick, at the same time agreed with Nash that he should take charge of the said stock in trade and business, and continue the same for her benefit, and permit her said son to have charge of the business of manufacturing and selling, and the collecting of moneys, and to account to Nash therefor, and that Nash should make purchases of goods as they might be needed for the purpose of keeping up the stock of goods, and making the same salable, until such time as the money due to the said Mary E. Burchard should be made out of the same; that Nash entered upon said business, took possession of the store and stock in trade and business, and put the said Frederick into the store to manage and care for the manufacture and sale of the goods, and to attend to collections, and continued the same in that way for about two months, when it was found that said Frederick was inefficient and inattentive, and that the business was being neglected and injured; that thereupon Nash, with the consent of Mary E. Burchard, employed George R. Nash to enter into said store, and take charge of the sales, and the money accruing from the sales and collections of the said business, and that thereupon said Frederick abandoned the same; that the business was continued until the latter part of December, 1884, when Nash caused said property to be advertised for sale at public auction, with a view of closing up the said business, it having proved unsatisfactory and unprofitable.

7. That, after he had taken possession of the stock of goods under and by virtue of said sale, one A. Origet, who was a creditor of the firm of Lyon & Gray to the amount of about $3,300, thereupon attached the stock in the hands of Nash, and, to avoid suit, seizure of goods, and stoppage of business, it was agreed between Nash and Mary E. Burchard that a compromise should be made, if possible, with the said Origet, and that Nash succeeded in

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settling with him for the sum of about $1,860, for which Frederick Lyon gave his notes, payable to the order of Nash, and which he indorsed, and that it was at the same time agreed between him and the said Mary E. Burchard that the said notes should be paid out of the proceeds of the said business.

8. That, after he had purchased the stock of goods at the sale under the chattel mortgage, he gave to the said Mary E. Burchard his bond, conditioned for the payment of the purchase price of the said goods, to wit, the sum of $2,600, in four years from the date thereof, which said bond was given in fact as security to the said Mary E. Burchard for the faithful discharge of his duties as agent of the said Mary E. Burchard in the carrying on and transacting of said business, and with the agreement that the moneys realized from the said business should be applied to the satisfaction of the said bond; that at the time of the giving of said bond Nash was not in anyway indebted to Mary E. Burchard, and the bond was not given for any indebtedness of his to her.

9. That, immediately after the said George R. Nash entered upon the control of the business, he caused an inventory to be taken of the goods then on hand, and found, upon examination, that they consisted mainly of old goods, remnants, and stock that had been on hand in the store many years before the purchase by Lyon & Gray, and were unsalable, and comparatively worthless; that the stock then on hand, inventoried at the old cost price, amounted to the sum of $5,821.08, while it was, in truth and in fact, not worth in the market to exceed one-third of that sum.

10. That during the time that Homer W. Nash carried on the said business, which was for a period of about 11 months, the goods purchased by him and put into the business, and the cost of manufacturing the same, amounted to the sum of $7,420.23; that during that time the sales made in the regular course of said business amounted to the sum of $7,962.25, and the money realized upon the sale of the balance of said goods at auction amounted to the sum of $1,668.65.

11. That, estimating the said goods at the price at which they were inventoried, the loss upon the business at the time of closing the same out was $3,610.04, which left the sum of $2,210.67 to be accounted for by Nash, and which he accounts for as follows: Expenses of

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closing out the stock, consisting of the salary of George R. Nash and store rents and incidental expenses, amounted to the sum of $1,598.20, and the amount paid by Nash on the claim of Origet amounted to the sum of $612.47.

12. That since the closing out of the business he has paid and secured to be paid the amount of the balance of the claim of said Origet, amounting to $1,277.53, and has given his note for $500, indorsed by Mary E. Burchard and Martin L. Sweet, and paid to Mary E. Burchard $29.84, making a total of $1,807.37, which Nash has either paid or become obligated to pay.

13. That, at the time of the sale of C. Burchard & Co. to Lyon & Gray, the firm of C. Burchard & Co. was indebted to various creditors for large sums of money, which were by Nash, as agent of Mary E. Burchard, reduced by various means to the sum of $2,200, for which said Mary E. Burchard gave her notes, which were indorsed by Nash, and are now unpaid, and held by the Fourth National Bank of the city of Grand Rapids; that he has advanced out of his own means, since the closing out of said business, for Mary E. Burchard, the sum of $150, which was paid to Peter Doran for services and expenses incurred by him in attempting to collect of the estate of the father of the said Louis M. Gray a part of the indebtedness of the firm of Lyon & Gray.

14. That he has paid in money and become obligated to pay for her a large sum of money, to wit, the sum of $4,157.37, and that she actually owes him for services rendered in the conduct of said business the sum of $1,800, together with the interest which has accrued upon the said several sums.

15. That at the time of making and entering into the agreement by which Nash purchased the said stock of goods at the said sale under the foreclosure of the chattel mortgage of the said Mary E. Burchard, and the giving of the said bond in the sum of $2,600, the said Mary E. Burchard had no unincumbered property or means with which to secure Nash for his said indorsements and his said undertakings, and, in order to secure him from loss by reason of the same, she at the same time made, executed, and delivered to him her then last will and testament, which said last will and testament contained the following statement, to wit:

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"Feeling under great obligation to my trustworthy friend, Homer W. Nash, of the city of Grand Rapids, for the aid and assistance he has rendered to me in extricating my affairs from financial embarrassment, and saving to me a considerable portion of my property; and he having this day given to me his bond conditioned for the payment to me of the sum of $2,600 four years from the date thereof, with interest thereon at the rate of seven per cent. per annum; and he having undertaken to discharge and relieve me from certain other money obligations which I owe to a large amount; and it being expected that he will be able to realize the money to pay the said bond and other indebtedness out of the goods and property of the late firm of Lyon & Gray, sold by me to him, the said Homer W. Nash, under and by virtue of a chattel mortgage owned and held by me upon the said stock of the said goods, not being in my judgment a certain and sufficient security to him,—now in consideration thereof, and being legally bound to save him harmless from any and all loss by reason of his having purchased the said goods, and given his said bond, and having undertaken other obligations owing by me, and being desirous of securing him from any such loss, and having now no other means of doing so, I hereby, in consideration of the premises, agree to pay to the said Homer W. Nash, or to his legal representatives, upon my death, the just and full sum of $5,000; and to that end I hereby declare that sum to be a first lien upon any and all estate I may leave at the time of my death, in favor of the said Homer W. Nash and his legal representatives, and I hereby direct my executor and require him, after having paid the necessary expenses of my burial, to first pay and discharge out of my estate said sum of $5,000 to said Homer W. Nash or his legal representatives."

16. That since the making of the said will said Mary E. Burchard has sold and transferred to the Michigan Masonic Home Association her farm, known as the "Burchard Farm," and the stock thereon, for the sum of $10,000, and has received to herself the sum of $3,300 or thereabouts, being the amount coming to her from the said sale after paying the incumbrances existing upon said property; and that since that time she has also sold five lots upon what is known as the "Comstock Addition," adjoining to the city of Grand Rapids, to one John Youell, as complainant is informed and believes, for the sum of $1,500.

17. That he is informed and believes, and charges the fact to be, that the said Mary E. Burchard has appropriated the proceeds of said sales to her own use, and

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intends to use the same, and place it beyond the reach of the provisions made by her in her said will, and to defeat complainant's security for the said sums of money which he has paid as hereinbefore stated, and which he has become obligated to pay.

18. That upon the closing out of the said business he was obliged to borrow money to pay and discharge the losses he had incurred in carrying on said business, and did borrow of Thomas Peck the sum of $500, and gave him his note therefor, which was indorsed by the said Mary E. Burchard and Martin L. Sweet, which said note remained unpaid for a long period of time, and was finally paid and discharged by Nash giving another note to the Grand Rapids Savings Bank, and procuring the same to be discounted, which said note was afterwards, on the 6th day of April, 1887, renewed by a note for the sum of $509.04 made by Nash, payable to the order of said Mary E. Burchard, 90 days after date, at the Grand Rapids Savings Bank, Grand Rapids, Mich., which note was indorsed by the said Mary E. Burchard and the said Martin L. Sweet; and, the said note remaining unpaid, afterwards, and on the 6th day of April, 1887, a judgment was obtained by the Grand Rapids Savings Bank against Nash as principal, and said Mary E. Burchard and Martin L. Sweet as indorsers, in the circuit court for the county of Kent, for the amount of $534.34 damages, and the costs taxed at $23.05, which judgment still remains unsatisfied of record.

19. That he is informed, and believes the same to be true, that sometime in the year 1887, and prior to April 6, 1887, said Mary E. Burchard, in order to secure the said Martin L. Sweet from loss and damage by reason of his having indorsed said note, made, executed, and delivered to him a deed of certain lands then owned by her in the state of Missouri, which are described in the bill of complaint.

20. That the indebtedness, which the money represented by the said note was borrowed to pay, arose and grew out of the said business of said Mary E. Burchard as above set forth, and was not for any indebtedness whatever owing by Nash on his own account, or in any other way or manner than as the agent of said Mary E. Burchard in the conduct of said business.

21. That the said Martin L. Sweet, although secured as aforesaid against loss by reason of having made the

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said indorsement, absolutely refused to pay said judgment, and was using every means in his power to force a collection of the same out of the complainant, while he holds in his hands the property of said Mary E. Burchard which he ought justly to apply to the satisfaction of the judgment.

22. That the said Mary E. Burchard has for a long time held and owned a policy of insurance upon the life of her son Frederick for the sum of $5,000, issued to her by the Connecticut Mutual Life Insurance Company of Hartford, Conn., which policy is numbered 148,578; and Nash is informed and believes, and so charges the fact to be, that Mary E. Burchard still holds the said policy of insurance in full force and vigor; and he charges that she ought, in fairness and good faith, to assign and transfer the same to him as security for the advances he has made and obligations he has undertaken, as set forth in this his bill of complaint, but that she unjustly and unfairly refuses to make any such transfer, or to do anything to secure him for his said advances and liabilities, made and undertaken in her behalf, and in the transaction of her said business.

23. Nash in his said bill offers, in case the prayer of his bill for the assignment and transfer of the policy of insurance shall be allowed, to pay and discharge the premiums that may become due from time to time upon said policy, or to secure the same to be paid in such manner as the court shall direct.

The prayer for relief is as follows:

1. That Mary E. Burchard may be required to come to an accounting with him respecting the business and trust conducted and carried on by him in her behalf set forth in the bill, and that the amount due to him from the said Mary E. Burchard may be ascertained and determined, and that she be decreed either to pay him the amount which shall be found due to him upon said accounting, or to secure to him the payment thereof.

2. That a receiver may be appointed of the property and assets of said Mary E. Burchard, with power and authority to take an assignment of said policy of insurance, and with power and authority to pay the premiums upon said policy as the same shall mature, and keep the same alive and in force during the life of the said Frederick Lyon, and upon his death to collect and receive

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the money that shall be due thereon, and to invest the same under the order and direction of the court, and annually pay over to the said Mary E. Burchard the net earnings of the said fund so long as she shall live, and after her death to pay over to Nash, or his executors, administrators, and assigns, the remainder of the said fund.

3. That said receiver have power also to take and receive from the said Martin L. Sweet a conveyance of the said 760 acres of land lying and being in the state of Missouri, and to hold the same in trust for the following uses and purposes, to wit: To sell and dispose of the same under the order and direction of the court, and reimburse himself out of the proceeds of such sale for all the lawful taxes that may have been assessed thereon and paid by him, and, next, to pay, satisfy, and discharge any and all indebtedness that may be found to be due from the said Mary E. Burchard to complainant; and that in the mean time said receiver be authorized and directed to pay and discharge all taxes lawfully assessed upon or against said land.

4. That said Mary E. Burchard may be ordered and directed by the decree of the court to assign, set over, and transfer to said receiver all her right, title, and interest of, in, and to the said insurance policy, and that the said Martin L. Sweet be ordered and directed by the decree of the court to set over and transfer to the said receiver, by a good and sufficient deed of conveyance, all of said land lying and being in the state of Missouri, upon payment of the judgment.

5. He also prays for an injunction against Mary E. Burchard, restraining her from selling, assigning, or transferring the policy of insurance, and restraining Martin L. Sweet from incumbering, selling, assigning, or transferring the Missouri lands, and that the Connecticut Mutual Life Insurance Company be restrained from accepting, acknowledging, and approving any assignment, transfer, or incumbrance of the policy of insurance on the life of Frederick Lyon to any person whomsoever, except such as shall be designated by the court. There is also a prayer for such other and further relief as shall be agreeable to equity and good conscience.

It is difficult to imagine the head of equitable jurisdiction under which the complainant's right to relief

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depends. Briefly stated, the complainant shows that he became an indorser for the firm of C. Burchard & Co., composed of Mary E. Burchard and Frederick Lyon; that he at that time was the friend, adviser, and assistant of Mary E. Burchard in her financial affairs. He does not allege that she had any other adviser, and it may be presumed that, in all the transactions narrated, she was acting under his advice. Then followed the sale to Lyon & Gray, who did business from June 23, 1882, to March, 1884, when they assigned to Follett. Up to this time the business relations between Nash and Mrs. Burchard were that of debtor and creditor, he being an indorser upon notes which grew out of the business transactions of C. Burchard & Co. It does not appear that up to the date last mentioned he had paid any money upon the notes indorsed by him. As soon as the property passed into the hands of the assignee, an agreement was entered into between Nash and Mrs. Burchard to the effect that the goods should be seized and sold upon her chattel mortgage, he should become the purchaser for her benefit, and the purchase price should be applied, so far as it would go, to the satisfaction of her mortgage; and Nash agreed that he would take charge of the stock in trade and business, and continue the same for her benefit, and permit Frederick Lyon to have charge of the business and account to him; Nash agreeing also to make purchases of goods to keep up the stock until such time as the money due from Nash to her could be made out of the same. He gave her his bond, conditioned for the payment of the purchase price, namely, $2,600, four years from the date thereof.

As a part of this agreement, to secure Nash from loss by reason of his indorsements, she at that time made, executed, and delivered to him her last will and testament, in which she recites that, in consideration of

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Nash having given this bond for $2,600, and undertaken to discharge and relieve her from certain other money obligations which she owed to a large amount (and in which she expresses the expectation that he will be able to realize the money to pay the said bond and other indebtedness out of the goods and property sold to him under the chattel mortgage, but which she considers an uncertain and insufficient security to him), and being desirous of securing him from loss, she thereby agrees to pay him $5,000 upon her death, and declares such sum to be a first lien upon any and all estate she shall leave at the time of her death, and directs it to be paid out of her estate as the first payment after the payment of her burial expenses. The only indebtedness which the bill shows to have existed at the time upon which complainant was obligated were the notes held by the Fourth National Bank, as stated in the thirteenth paragraph of his bill, amounting to $2,200. He makes no case under this agreement for equitable relief.

He further shows that, after he had become the purchaser of the stock at the mortgage sale, new complications arose. A creditor of Lyon & Gray attached the goods, and they thought it better to settle than to litigate, and he became the indorser for Lyon for $1,860, and agreed with Mrs. Burchard that the note should be paid out of the proceeds of the business. He shows that he carried on the business for about 11 months, and finally closed it out at auction. He does not allege that this manner of conducting and closing out the business was with the consent of Mrs. Burchard. The bill alleges that in so conducting the business, and in all the transactions, he was acting as the agent of Mrs. Burchard. If he acted as an agent, he kept his own accounts. He knows, if anybody does, how much money he has received,

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how much he has paid out, and what obligations he has assumed in her behalf, and what he has paid and discharged, and what remain unpaid. It is not a case of mutual accounts; the account is all upon one side. Hence chancery has no jurisdiction on the score of accounting.

Equity often treats the transactions between principal and agent as of a *quasi* fiduciary character, and, where such fiduciary relation exists, it will lay hold of the duty resting upon the defendant to render an account, and compel him to do so. In such cases, it is usually the agent who occupies the position of *quasi* trustee, and, if this were a bill brought by Mrs. Burchard upon the alleged agency substantially as stated in the bill, equity might, under proper charges of malfeasance against the defendant, compel him to account. But the agent, Nash, has no such right to call upon Mrs. Burchard for an account under the statements of his bill.

In *Padwick v. Stanley*, 9 Hare, 627, the bill was filed by a solicitor and agent against his client, and prayed for an account of moneys and liabilities which the complainant stated he had raised, advanced, and incurred for the defendant by means of bills, notes, and otherwise, and the particulars of which he alleged were very complicated, and for the discovery of letters and documents relating to such transactions, which the bill averred the complainant had from time to time written and given up to the defendant, and of divers of which the complainant stated he had no copies. The bill sought to have the balance of the account paid, and that the complainant might be discharged from such alleged outstanding liabilities. The defendant demurred.

The vice-chancellor, Sir George James Turner, in passing upon the demurrer, said:

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"It was sought to support this bill on the right of a surety to be discharged from his liability. I have not the least intention to say anything which could prejudice such a right; but I conceive that the cases in which such a jurisdiction is exercised by this court are cases where the creditor has a right to sue the debtor, and refuses to exercise that right. It does not appear upon this bill that the creditor has any present right to sue. It is consistent with the statements on the bill, which must be taken most strongly against the pleader, that the bills in respect of which a liability is said to be created may not yet have arrived at maturity, and that the defendant, therefore, is not in a condition to take any step for the purpose of enforcing his rights in respect of such bills. It was then said that this was a case of principal and agent, and that, if the principal may file a bill against his agent, the agent may file a bill against his principal; but I cannot admit that the rights of principal and agent are correlative. The right of the principal rests upon trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal. It was lastly said that the accounts had been given up by the plaintiff to the defendant; but, if that case were sufficiently made out, it would give the plaintiff a right to file a bill of discovery, but it would not give him a right to relief."

And see, also, *Smith v. Leveaux*, 2 De Gex, J. & S. 1, and cases cited in note.

Neither is the complainant entitled to relief on the ground that he is a surety for Mrs. Burchard or co-surety with Sweet. If it be granted that Nash is a surety for Mrs. Burchard upon the notes held by the bank, he does not show that he has paid them, and until he has performed his part of the undertaking he has no ground for calling upon Mrs. Burchard to give him any additional security than such as was placed in his hands at the time he received the goods at the chattel mortgage sale. Neither can he ask for any different contract for security than that which he received by the terms of the

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will. Equity has no power to create new contracts between parties, or to supply omissions in contracts they have deliberately made, in the absence of fraud, accident, or mistake. What was the security provided for in the will? Simply that he was to be paid $5,000 out of the estate she might leave at her death, after paying the expenses of her burial. This did not contemplate that she should not dispose of any property she might have at that time, or that she should not use it in her support, or as she pleased. No lien was created or intended to be created upon any of her property during her life, but only upon such as she should leave at the time of her death. She made no contract for any other or different security than that mentioned.

Neither a contract creditor nor a surety can, by proceedings in equity, compel his debtor or principal to turn his property over to a receiver to secure a debt or satisfy it before obtaining judgment and exhausting his remedy at law.

Neither has complainant any right to the security held by Sweet to indemnify him against his indorsement on the $500 note to the Savings Bank. On the face of the note Nash is the maker; Mrs. Burchard and Mr. Sweet are indorsers. It is competent for the first indorser to secure the second indorser, but the maker has no right to be subrogated to the place of a second indorser. So, also, taking Nash's statement that Mrs. Burchard is the one who ought primarily to be liable in equity for the payment of the note, if she should secure Sweet as a second or as a co-indorser, Nash cannot be entitled to the benefit of the security without having first paid the note. Burge, Sur. §§ 261, 269.

Upon any view I can take of the statements of the bill, I cannot see that the complainant has made such a case

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as entitles him to the relief prayed; and the decree appealed from is affirmed, with costs.

MORSE, LONG, and GRANT, JJ., concurred. MCGRATH, J., did not sit.

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ROSS ARCHER v. THE FORT WAYNE & ELMWOOD RAILWAY COMPANY.

Negligence—Street railways—Riding on front platform.

1. A passenger who, by reason of the crowded condition of a street-car and of the rear platform, is obliged to ride on the front platform, has a right to do so in the absence of regulations to the contrary, and is not guilty of negligence in so doing; citing *Upham v. Railway Co.*, 85 Mich. 12.
2. It is a question of fact for the jury to determine whether or not such manner of riding is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent passengers from being thrown from the car, and the question of the negligence of a passenger *while so riding*, and of the company, should be submitted to the jury under proper instructions.

Error to Wayne. (Gartner, J.) Submitted on briefs June 11, 1891. Decided July 28, 1891.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

S. E. Engle, for appellant.

Edwin F. Conely and *Orla B. Taylor*, for defendant.

CHAMPLIN, C. J. On the 25th day of December, 1888, between 8 and 9 o'clock in the evening, the plaintiff took passage upon one of the defendant's cars, but, on

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account of the number of passengers in the car and upon the rear platform, was compelled to stand upon the front platform of the car, from which he was thrown, and received very severe injuries by his leg being run over and crushed by one of the car-wheels. The court took the case from the jury, and directed a verdict for the defendant.

The declaration in the case alleges the duty of the defendant company, which plaintiff claims it violated, as follows:

1. To provide and furnish said plaintiff a safe and convenient seat or place to ride while being so conveyed as such passenger.
2. To provide prudent, safe, and competent agents to manage said car, and provide for his safety as such passenger.
3. Not to drive said car at such a rate of speed as to be dangerous to said passengers, and to the plaintiff as a passenger.
4. To have a chain or guard across the passage-way down the steps at the end of the front platform extending across the passage-way, for the safety of passengers.
5. To slacken the speed of the car and to stop when called upon to do so by the plaintiff at the time he slipped and fell from the car, while he was hanging to the guard-rail of the car.

The neglect of duty alleged by the plaintiff in his declaration is as follows:

1. That the defendant wrongfully, negligently, and carelessly then and there furnished and provided imprudent and incompetent agents, to wit, the driver and conductor then in charge of the car.
2. That the defendant wrongfully and negligently failed to provide a safe and suitable seat or place for the plaintiff in and upon such car as such passenger, and negligently and carelessly allowed the car to be so filled and crowded as to prevent the plaintiff from passing inside the car, which in the exercise of due care he endeavored to do, and thereby wrongfully compelled him to stand and ride upon the front platform of said car.

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3. That while he was so lawfully standing and riding, and in the exercise of due care on his part, the defendant wrongfully and negligently had no chain or guard across the passage-way down the steps at the end of the front platform on the right hand of the car so moving eastward, but wrongfully and negligently allowed said chain or guard to be hanging there, not in use, and not hooked up as a guard and protection across the steps in its usual place where it was customary to keep the same.

4. That the driver and conductor wrongfully, recklessly, and carelessly mismanaged said car, and were then and there going at a high rate of speed, when the driver wrongfully and carelessly, without any notice or warning to the plaintiff, struck the horses a blow with his whip, causing them to jump forward, giving the car a sudden jerk and a pitching, rocking motion, and still further increasing its speed to a high and dangerous rate, just as it was passing the cross-walk on Riopelle street, thereby then and there throwing the plaintiff from the platform at the right hand thereof, causing him to slip from the step, and to swing around to his right towards the car, while trying to save himself by clinging with his right hand to the hand-rail of the car, the swift motion of the car dragging him backwards, while struggling to recover himself, and while calling, as he then did, to the driver to stop or slacken the speed of the car, and causing him to fall upon his back with his leg across the rail of the track, so that the car-wheel ran over it, and crushed the ankle-joint and bones of the leg below the knee, and cut, crushed, and bruised the flesh of his leg.

The declaration, having set out the duty of the defendant, and its neglect to observe such duty, then states that, "by reason of the wrongful and negligent acts of the defendant aforesaid, the plaintiff was seriously hurt," etc.; and concludes, "whereby, and by reason of the premises aforesaid, the plaintiff hath sustained damages," etc.

The testimony introduced upon the trial showed that the plaintiff and his father took passage upon the car on the night stated, and that the car was filled inside, and the rear platform also, and that they were obliged to

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take passage upon the front platform; and that while riding in that place, with his back against the car and holding onto the guard-rail at the right with his right hand, the driver struck the horses with his whip, which caused the car to swerve to the left; and, as he was standing on the right hand of the door of the car, his back was thrown against the end of the car, and he went to pitch forward to try to recover his footing, slipped down the step, striking his hip against it, and, hanging to the guard-rail, his back was turned towards the horses. He tried to regain his footing, and did regain it, and tried to get back on the car, but slipped off the lower step, and was swung around, and, still hanging by his right hand, was dragged along the ground, and his foot was caught under the wheel of the car, and run over. He called to the driver to stop, and he testifies that the driver "appeared to be having all he could do to attend to his horses. They were kind of unmanageable, and he did not see me, or did not stop the car until I was run over." He testifies that he thought he shouted loud enough for him to hear, but he did not make any attempt to stop the car. The word he used when he called out was "Stop!" as loud as he could. He testifies that the driver did not go over 10 or 15 feet after the car ran over him until it was stopped.

The plaintiff's father was also sworn as a witness on behalf of the plaintiff, and testified that he was also riding upon the front platform on the left of the door; that the road appeared to be very rough; that the car swayed and swerved a great deal, with a kind of rocking motion, and that he held onto the dash-board with both hands; that the driver struck the horses a blow with the whip, which caused them to start suddenly. He also testified that the driver was driving with loose lines, and did not make any effort to stop when his son called out, "until

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he went quite a little past; that he told the driver to stop, that the boy had fallen off; that the driver went only a short distance, he did not think he went over half a car, from the time he got hurt, but from the time he fell off "he must have gone three or four rods, anyway." He also testified that there was no guard across the steps on either side of the platform. The plaintiff testified as to the speed at which they were going as follows:

"They seemed to be going quite rapidly. I have seen them drive fully as fast plenty of times, and a good deal slower. They seemed to have a good rate of speed; that is, at the time I fell off."

Testimony was also introduced tending to show that the driver was behind time, and was endeavoring to make it up.

The plaintiff introduced in evidence sections 4 and 5 of chapter 107 of the Revised Ordinances of 1890, as follows:

"SEC. 4. Every street-railway company in the city of Detroit shall so inclose and guard the front platform of each car operated and run by any such company within the limits of the city as to prevent passengers from getting on or off such platform. (Approved July 14, 1873.)

"SEC. 5. No conductor or driver on any street-railway car, while such car is in use, shall permit any person to enter or leave the same by way of the front or forward platform; and no person, when the forward platform of any street-railway car in actual use is inclosed or guarded, as required in the preceding section, shall enter or leave, or attempt to enter or leave, such car by the forward platform thereof; and no person under the age of sixteen years shall ride on the rear platform of any street-railway car, or get on or off the same while said car is in motion. (Approved May 4, 1876.)"

There was no testimony introduced upon the trial which tended to show that the car upon which the plaintiff was riding had a chain or any other device for preventing

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persons from entering or leaving by way of the forward platform, or to protect them while riding thereon.

The only testimony bearing upon the question of the negligence of the company or its agents, namely the conductor and driver, in the management of the car, was the testimony showing that the car was filled with passengers inside, and the rear platform was also filled, so that the plaintiff could not obtain passage inside the car, and was thereby compelled, if he rode upon that car, to take passage upon the front platform. This he had a right to do, and it was not negligence on his part so to occupy the front platform under the circumstances. *Upham v. Railway Co.*, 85 Mich. 12. It does not appear from the plaintiff's own testimony that the car was driven at an unusual rate of speed, and it does appear that the accident happened upon a straight track, and that there was nothing calling upon the defendant and its agent to give any special warning that he was about to use his whip upon his horses. The plaintiff was in position where he could observe the movements of the driver, and was as well qualified to see and know when the whip was used as if he had been warned by the voice of the driver that he was about to strike his horses. The position he occupied upon the car was one fraught with danger, and called upon him to use diligence commensurate to the dangerous position he occupied. It is true that the railway company owed to him, while riding in that place, increased care not to so conduct and manage its cars as by its neglect to cause him injury, and it is a question of fact which ought to be submitted to a jury to determine whether or not the position of riding upon the front platform of a street-car is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent them from being thrown from the car.

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It was said in the case above referred to that it was difficult to see upon what reason the courts can hold that platforms of cars are dangerous, and that persons who ride there assume all the risk, and thereby relieve such companies from all liability, except for gross, willful, and wanton misconduct; and, under the facts of that case, it was said that the question of the negligence of the plaintiff, as well as of the defendant, belonged to the jury to determine, and should have been submitted to them under proper instructions. We think this case comes within the ruling above referred to, and should have been submitted to the jury.

The judgment will be reversed, and a new trial ordered.

The other Justices concurred.

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CARRIE E. WHITE v. ROBERT KING.

License to cut timber—Bill of sale—Authority of agent.

1. While the absolute title to standing timber in this State will not pass except by deed, in the same manner as the fee of the land, a license to enter and cut and remove such timber can be given, which, unless revoked before the timber is cut, and thereby converted into personalty, will pass the title to so much as has been severed from the soil; citing *Greeley v. Stilson*, 27 Mich. 157; *Haskell v. Ayres*, 35 Id. 90; *Wetmore v. Neuberger*, 44 Id. 362; *Spalding v. Archibald*, 52 Id. 365.
2. A bill of sale to a third person of standing timber, with license to cut and remove it, is no more than a license, and will not operate as a revocation of a former license until notice is given to the first licensee.
3. This case involves the question of the authority of a third party to act as agent for the owner in the sale to plaintiff of standing timber which the owner afterwards sold to the defendant,

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which question it is held should have been submitted to the jury upon the testimony.

Error to Otsego. (Kelley, J.) Argued June 30 and July 1, 1891. Decided July 28, 1891.

Replevin. Plaintiff brings error. Reversed. The facts are stated in the opinion.

A. A. Crane (*Oscar Adams*, of counsel), for appellant.

Geer & Williams, for defendant.

MORSE, J. This is an action of replevin, brought to recover a quantity of saw-logs cut from 40 acres of land owned by Edward S. La Salle, of Portland, Mich., and located in the county of Otsego. The circuit judge directed a verdict for the defendant. This was error.

The plaintiff showed that she purchased the timber standing upon the land of one A. A. Crane. Crane testified that he sold the timber upon the authority of two letters received from La Salle, which letters are as follows:

"PORTLAND, Mich., May 19, 1888.

"COOPER & CRANE,

"Gaylord, Mich.

"*Dear Sirs:* I have had several chances to sell a piece of land I have in Bagley township, or to sell the pine on it. I don't care to sell the land, but perhaps the pine will sell now as well as ever. If you are still in the real-estate business, I wish you would look it over, and see what the pine is worth; and if there is enough to make it any object I think I will let you sell it, as you can attend to it much better than I can. Robert King, of Lapeer, who has a shingle-mill in or near Gaylord, wrote to me two months ago, wanting to buy the land, and a few days ago he came to Portland to see me. So if you will look it up, and report as soon as convenient, I can tell you at once what to do. No estimate was made on the pine on the list on R. R. books. I have the impression that there are not more than a dozen or

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fifteen trees. The land is the S. W. ¼ of the N. W ¼ of Sec. 11, town 30 N., R. 3 W.,—40 acres.

"Yours respectfully, E. L. LA SALLE,
"Portland, Mich."

"PORTLAND, Michigan, May 28, 1888.

"A. A. CRANE,
"Gaylord, Mich.:

"Yours of the 24th received. I did not suppose the pine was in so bad a condition. You may sell the pine if you can. I have written to King that I would leave it to you. Of course you will get all you can for it. Have you any idea what the land will bring after the pine is off? Possibly I may want to sell it before next spring.

"Yours truly, E. L. LA SALLE."

July 11, 1888, Mr. Crane sold the pine timber to plaintiff for $115, of which she then paid $15 down. She paid the balance August 11, 1888, when Crane gave her the following receipt:

"GAYLORD, Aug. 11, 1888.

"Received of Mrs. John White $100, balance due for pine timber on the S. W. ¼ of the N. W. ¼, Sec. 11, town 30 north, range 3 west.

"E. L. LA SALLE.
"Per A. A. CRANE, Agent."

Plaintiff entered upon the land about July 11, 1888, under a parol license granted by Crane as La Salle's agent, and cut the timber into saw-logs, preparatory to removal. The cutting was completed September 1, 1888. October 17, 1888, defendant notified plaintiff that he claimed to own the timber, and forbade her removing the logs. This was the first knowledge she had of any adverse claim to the timber by any one. Soon after this notice, defendant removed the logs, against plaintiff's protest, and she brought this suit. Defendant claims that he bought the timber of the owner, La Salle, June 28, 1888, and put in evidence a copy of a bill of sale of that date,

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which bill of sale also contained a license to enter upon the land and take off the timber at any time within two years from its date.

The circuit judge was of the opinion that there was no evidence to go to the jury showing that Crane had authority from La Salle to sell the timber to plaintiff. Crane testified that he received the two letters from La Salle, and when they were offered in evidence the defendant's counsel said:

"We will object to them. They are not shown to be the letters of Mr. La Salle. There is no proof that Mr. La Salle ever wrote them. Simply to save the point,—they may and they may not, as far as we know."

The letters were received in evidence. It will be noticed that the first letter refers to the defendant. From this letter it appears that King had written to La Salle, and had also been to Portland to see him, about this land. This appears to have been the occasion of La Salle's writing this letter to Crane. This letter was directed to Cooper & Crane, with whom the record shows that La Salle had had correspondence with reference to this land before. Crane replies to this letter, and receives the second one. When the defendant takes the stand in his own behalf, he testifies that, when he called upon La Salle at Portland, he told La Salle that his name as the owner of this land had been given him by Mr. Crane, and La Salle said that he would write to Crane, and have him place a price upon the timber, and he would sell it, but he had no knowledge of the value of the timber. "He said he would write to Mr. Crane, and I could see Mr. Crane when I came up here, *and perhaps could make a deal with him for the timber.*" He further testifies that about a month afterwards he saw Mr. Crane, and tried to buy the timber of him. Not being able to do so, he

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wrote to La Salle that he thought Crane was not doing the fair thing in regard to the land, and that if La Salle wanted to do anything with the defendant, and would place a price upon the timber, he would take it at what it was worth. La Salle wrote in reply, wanting to know if Crane would not make the defendant any price on the timber. We think, with this evidence of the defendant supplementing the letters, the plaintiff was entitled to go to the jury upon the question of Crane's authority to sell the timber, as neither Crane nor the plaintiff received any word from La Salle, or any one else, in contradiction to these letters, until the notice from the defendant of October 17, 1888. If La Salle sold the timber to defendant June 28, 1888, he did so without revoking the agency of Crane, and without the knowledge of Crane or the plaintiff. The plaintiff, having, under the circumstances shown, entered upon the land, and converted the timber into personalty, was entitled to recover the value of the same, if Crane was authorized to sell it as the agent of La Salle.

It is true that the absolute title to standing timber in this State will not pass except by deed, in the same manner as the fee of the land; but a license to enter and cut such timber, and remove the same, can be given, which, unless revoked before the timber is cut, and thereby converted into personalty, will pass the title to so much as has been severed from the soil. *Greeley v. Stilson*, 27 Mich. 157; *Haskell v. Ayres*, 35 Id. 90; *Wetmore v. Neuberger*, 44 Id. 362; *Spalding v. Archibald*, 52 Id. 365. A sale of the land would revoke the license, but in this case the defendant had only a bill of sale of the timber, which was no more than a license. Until the plaintiff received notice of this, it could not operate as a revocation of her license.

Other errors are assigned upon the record, but, as

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these are not likely to arise upon another trial, we shall not discuss them.

The judgment is reversed, and a new trial granted, with costs of this Court.

The other Justices concurred.

JAMES M. MUNRO v. ANNA L. EDWARDS.

[See 86 Mich. 91.]

Contract for sale of land—Specific performance—Right of possession.

Upon a rehearing of this case, the decree ordered on the first hearing is modified so as to entitle the complainant to the possession of the land upon payment, within 60 days from July 28, 1891, of the balance of the purchase price, less the amount of the mortgage, the payment of which he assumed, with interest from said date.

Appeal from Wayne. (Hosmer, J.) Reargued July 2, 1881. Decided July 28, 1891.

Bill for the specific performance of a contract for the sale of land. Decree ordered on former hearing modified as stated in head-note. The facts are stated in the former opinion.

Haug & Yerkes, for complainant.

Alex. D. Fowler, for defendant.

MCGRATH, J. The question as to whether or not complainant is entitled to possession under the contract before the payment of the balance of the purchase price

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is not free from doubt, but on rehearing complainant proffers payment of such balance, and I think that the decree heretofore ordered by this Court may be so far modified as to entitle complainant to possession upon payment, within 60 days from the date hereof, of the balance of said purchase price, less the amount of the mortgage upon said premises, with interest from the date hereof.

MORSE, LONG, and GRANT, JJ., concurred.

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THE COMMON COUNCIL OF THE CITY OF GRAND RAPIDS v. THE BOARD OF PUBLIC WORKS OF THE CITY OF GRAND RAPIDS.

[Two cases.]

Municipal corporations—Public improvements—Authority of common council and board of public works.

1. The authority given to the board of public works of the city of Grand Rapids, by section 8 of Act No. 321, Laws of 1873, to determine as to the *particular kind and quantity* of materials to be used in the construction of any public work the construction of which the common council has declared to be a necessary improvement, has reference to *detail*, and not to the *general character* of the work.
2. It is unquestionably the duty of the common council to avail itself of whatever information or knowledge the board of public works possesses in determining the general character of a public work, but the authority for the expenditures necessary to its construction must originate with the council, and includes the right to determine the question of cost, dimensions, and general character.

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Mandamus. Submitted June 30, 1891. Granted July 28, 1891.

Relator applied for *mandamus* to compel respondent to proceed with the work of paving certain streets in the city of Grand Rapids. The facts are stated in the opinion,

William Wisner Taylor, city attorney, for relator.

More & Wilson, for respondent, contended:

1. Under the charter, the cost of street improvements is paid by special or local assessments levied upon the property benefited, and the validity of these assessments depends upon the strict conformity to law with which all the preliminary steps are taken. Among these preliminary steps, none is more important than those required to be taken by the board of public works; and surely the determination of the kind and quantity of material to be used in improving a street is as essential to a valid assessment as any act required of the board. If, then, this act of determination by the board is essential to the validity of a tax, it is a duty the performance of which is imperative. It cannot be avoided by the board, nor can it be delegated to or assumed by any other body or individual; citing *Baisch v. City of Grand Rapids,* 84 Mich. 666.
2. In the case at bar the council declared the grading and graveling of the designated portion of Grandville avenue, with vertical stone curb and paved gutters, a necessary public improvement. Here the kind of material to be used is determined by the council, and nothing is left to the board but to adopt and record that determination as its own. This is a usurpation of the functions of the board, and a violation of the clear intent of the law.

McGRATH, J. Relator asks for writs of *mandamus* to compel respondent to proceed with the work of certain pavements in the city of Grand Rapids.

Under the charter of the city of Grand Rapids, the

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abutting owner pays the cost and expense of all paving. The charter provides that—

"The common council shall have the care and supervision of the highways, streets, bridges, lanes, alleys, parks, and public grounds in said city, and it shall be their duty to give directions for the repairing, preserving, improving, cleansing, and securing of such highways, bridges, lanes, alleys, parks, and public grounds, and cause the same to be repaired, cleansed, improved, and secured from time to time as may be necessary; to regulate the roads, streets, highways, lanes, parks, and alleys already laid out, or which may hereafter be laid out, and to alter such of them as they shall deem inconvenient, subject to the restrictions contained in this title."

Section 2 of title 6 provides that—

"The board of public works of said city shall have power and are empowered to grade, gravel, raise, level, repair, amend, pave, or cover, with broken or pounded stone, plank, or other material, all streets, alleys, lanes, highways, public grounds, or sidewalks in said city, and such designated portions of any street, alley, lane, or highway in said city, as the common council, by a majority vote of all the aldermen elect, shall by resolution declare to be a necessary public improvement, whether the same has previously been graded, graveled, raised, leveled, repaired, amended, paved, or covered as aforesaid, or not: *Provided*, That the common council shall not have authority to declare the grading or paving of any street, lane, alley, or highway a necessary public improvement, unless it shall have been petitioned so to do by the owners of a majority of all property on said street, lane, alley, or highway, or designated portion thereof, proposed to be improved, residing in the city of Grand Rapids, after the grade shall have been established; but this proviso shall not apply when said common council shall, by a vote of five-sixths of all the members elect of said common council, declare such grading or paving a necessary public improvement."

The charter contains the following further provisions:

"SEC. 6. Said board of public works is hereby

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empowered to determine and establish the grade lines of all streets, highways, lanes, alleys, sidewalks, and public grounds in said city; to locate all necessary sewers, drains, culverts, vaults, arches, and bridges, wells, pumps, and reservoirs in said city; to cause to be graded, graveled, paved, planked, or covered with other materials all such streets, highways, lanes, alleys, sidewalks, and public grounds in said city, and to construct all such main and lateral sewers, drains, culverts, vaults, arches, and bridges, wells, pumps, and reservoirs, in said city, as the common council of the city of Grand Rapids shall by resolution declare to be necessary improvements.

"SEC. 7. Said board of public works shall have charge and control of the erection and construction of engine-houses, city hall, and other public buildings, except school-houses, in said city. In the erection of public buildings, and in the grading, graveling, paving, planking, or covering with other material any street, highway, lane, alley, or public ground, and in constructing sewers, drains, and other public works or improvements, including works for supplying said city with water, said board shall advertise for proposals to execute the work, and for materials, according to plans and specifications adopted by said board, and may contract with the lowest responsible bidder: *Provided*, said board shall require security for the performance of proposals tendered to said board, if the bid is accepted, and security for the performance of contracts: *And provided*, it shall be at the option of the board to reject any or all bids or proposals made; and, if all bids are rejected, shall thereupon readvertise for proposals to execute the work, and for materials, as often as may be necessary, unless some responsible party will take the contract at the lowest bid previously offered, which the board may accept if, in their judgment, it is for the best interests of the city.

"SEC. 8. When the common council of said city decide that the construction of any public work in said city is a necessary improvement, the board of public works, with all convenient dispatch, shall determine as to the particular kind and quantity of materials to be used therefor, and estimate the probable cost and expense of such work, and of the materials to be used, in detail, and cause to be prepared, so far as necessary, plans and specifications for such work, and report their estimate to the common council as a basis for assessing or otherwise raising,

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according to law, the funds necessary to enable the board to go forward and complete such work.

"SEC. 9. The paving, grading, graveling, planking, or covering with other materials, of all streets, highways, alleys, lanes, sidewalks, and other public places, the building and construction of all sewers, drains, culverts, arches, and bridges, wells, and reservoirs, and the erection of public buildings and works, which the common council shall by resolution declare to be necessary improvements, shall be done under the direction and supervision of the board of public works, and upon contracts and under plans and specifications to be prepared by the city surveyor, and approved by such board; and all moneys raised or appropriated by the common council for such purposes shall be expended by said board of public works for the purposes designed, so far as shall be necessary, and to be drawn from time to time from the appropriate fund, by order of the council, upon estimates of amounts earned or payable, to be made by the board and reported to the council in accordance with such contract, and no money shall be drawn from the city treasury under this act except upon the order of the common council. All contracts prepared in accordance with this section, or any section of this act, or the act of which this act is amendatory, shall be first submitted to the common council of said city for approval, before the adoption and execution thereof; and the said council shall have power to reject said contracts, if it shall see fit so to do."

Under these provisions, a majority of all the resident property-owners on Grandville avenue, between Bartlett street and Hall street, petitioned the common council to cause said street to be graded, graveled, and the gutters thereof paved with cobble-stone, with vertical curb; and a petition was also presented to the common council by a majority of the residents of Erie street, asking for the improvement by paving with cobble-stone; with Medina stone curb. These petitions were referred to the proper committee, who reported thereon. The board of public works furnished to the common council the required

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estimates, and the common council adopted the following resolutions:

"*Resolved*, by the common council of the city of Grand Rapids, that the grading and graveling of Grandville avenue, a public street in the city of Grand Rapids, from the center line of Bartlett street, a public street in said city, to the north line of Hall street, a public street in said city, including the construction of a vertical stone curb in said described portion of said Grandville avenue, and also including the construction of the necessary bridges, culverts, paved gutters, cross-walks, man-holes, catch-basins, approaches, and cess-pools in said described portion of said Grandville avenue, is a necessary public improvement."

"*Resolved*, by the common council of the city of Grand Rapids, that the grading and paving with cobble-stones of Erie street, a public street in the city of Grand Rapids, from Canal street, a public street in said city, to Bank street, a public street in said city, including the construction of a vertical Medina stone curb in said described portion of said Erie street, and also including the construction of the necessary bridges, culverts, gutters, cross-walks, man-holes, catch-basins, approaches, and cess-pools in said described portion of said Erie street, is a necessary improvement."

The board of public works declined to proceed with the work, saying in the Grandville avenue case that—

"Grandville avenue is one of the most important thoroughfares in the city of Grand Rapids, the travel upon which is continuous and heavy. The material prescribed in the resolution for the improvement of this street (especially from Bartlett street to Fifth avenue, the portion of said avenue in which the water-mains are laid, and is sewered) is not, in the judgment of the board of public works, such as the importance of the work demands; and, as the board is the judge of material to be used in the improvement of streets, we respectfully decline to proceed with the work under the resolution above mentioned."

In the Erie street case it was said that—

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"The determination of the kind and quality of material to be used in paving streets belongs to the board of public works. At a meeting of said board held Saturday, May 16, 1891, it was decided not to proceed further with said improvement under the resolution above referred to, as the materials prescribed are not, in the judgment of the board, such as the improvement requires."

It was the evident intention of the Legislature to provide a way in which resident owners of property could procure the pavement of streets, to afford the best measure of protection to such owners against unwarranted burdens, and to provide a way in which streets could be improved without the concurrence of the resident owners if the necessities of any particular case demanded such improvement. Clearly, the intention was to prevent the common council from imposing a burden upon the owners without the consent of such owners, unless by a five-sixth vote of the aldermen elect. It will not be seriously urged, if the protection of the owners against burdens which they did not care to assume was the purpose of the restriction upon the powers of the council, that, in case the owners petitioned for a certain kind of pavement, the council could impose a different and more expensive pavement upon them, without the necessary five-sixths vote. Inasmuch as the council has the right, in its discretion, to refuse to grant the prayer of the petition, the public is protected. It was clearly not the intention of the Legislature to afford a way in which owners could procure the improvement of the streets in front of their property, through the common council, and then to empower the board of public works to block the improvement, and force the common council to declare some other kind of pavement a public necessity. Nor was it the intention of the Legislature to empower the board of public works arbitrarily to determine the general character of public improvements. It is difficult

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to imagine how the common council could intelligently declare a work to be a necessary improvement without any reference to the general character of such work. The same provisions apply to all public improvements. A resolution declaring that a city hall, an engine-house, a police station, or a sewer was a necessary improvement, without referring to cost, size, capacity, or general character, would not satisfy even the letter of the charter. These considerations must enter into the determination of the question of the necessity. A building of given dimensions might be inadequate for one locality, and be too large for another; and to allow the board of public works to determine either question would practically empower that body to determine the question of the necessity of the improvement.

It is unquestionably the duty of the council to avail itself of whatever information or knowledge the board of public works possesses, but the authority for these expenditures must originate with the common council, and that authority includes the right to determine the question of cost, dimensions, and general character. If the board has the power to defeat the expressed will of the property-owners, and the determination of a majority of the council, because it does not consider the pavement adequate, then it may defeat the determination arrived at by a five-sixths vote. The Legislature did not intend to vest this power in the board of public works, even though it be conceded that the Legislature could divest the council of such power. The authority to determine the "particular kind and quantity of materials" has reference to detail, and not to the general character of the work. The use of the word "particular" in that connection is significant, and the evident intention of the Legislature was to empower the board of public works to provide detail where the same was necessary. If the owners should

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petition for a cedar block pavement, and the common council should grant their prayer, the specifications therefor would necessarily involve detail as to soundness, diameter, and length of blocks. It will not be insisted that the board might substitute oak or pine for cedar. If a sand foundation was suggested, they could not substitute concrete, although they might name the particular kind of sand. It does not follow that, because they are empowered to determine the particular kind of material, they may change the character of the work, or any substantial element of it. The size of the cobble-stone in the Erie-street case affected materially the character of the pavement, and the selection of Medina stone was as much a matter of discretion as the selection of Ionia or Lake Superior stone for a public building would have been, and the selection of either would involve detail as to size, facing, setting, etc.

The writs must issue as prayed.

The other Justices concurred.

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JOHN SCHMIDT v. BESSIE SPENCER, IMPLEADED WITH HOMER SPENCER.

Married women—Promissory note—Separate estate.

1. A note given by a husband and wife, for a loan made and used for his benefit, is void as to the wife, in the absence of representations by her that it is made for her use and benefit.
2. The fact that the husband asked for the loan as the agent of his wife is immaterial, in view of the fact that the lender knowingly took the note of both, as he will be charged with knowledge of the law voiding such a note as to the wife unless valid for reasons stated in former head-note.

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Error to Osceola. (Judkins, J.) Argued June 4 and July 2, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Dumon & Cogger, for appellant, contended:

1. Before the notes could be properly received in evidence as against the appellant, there should have been evidence in the case tending to show that they were given for money that was used for her benefit, or for the benefit of her estate; citing *Emery v. Lord*, 26 Mich. 431; *West v. Laraway*, 28 Id. 465; *Russel v. Bank*, 39 Id. 675; *Powers v. Russell*, 26 Id. 179; *Insurance Co. v. McClellan*, 43 Id. 565; *Johnson v. Sutherland*, 39 Id. 579; *Schlatterer v. Nockodemus*, 51 Id. 627.
2. There is no presumption that the husband of a married woman is her agent; citing *Fechheimer v. Peirce*, 70 Mich. 441; and there is no rule of law by which one can become an agent except by the will of the principal; and a married woman cannot give to an agent power which she does not herself possess, namely, to bind herself except concerning her own property; citing *Insurance Co. v. McClellan*, 43 Mich. 566.
3. There was in the case, as against the appellant, nothing to go to the jury, and the court should have directed a verdict in her favor. It has been uniformly held in this State that our statutes do not authorize a married woman to become personally liable on an executory promise except concerning her separate estate, and that a note given by her for any other purpose is void; citing *DeVries v. Conklin*, 22 Mich. 255; *West v. Laraway*, 28 Id. 465; *Ross v. Walker*, 31 Id. 120; *Jenne v. Marble*, 37 Id. 321; *Buhler v. Jennings*, 49 Id. 539; *Edwards v. McEnhill*, 51 Id. 160; *Fechheimer v. Peirce*, 70 Id. 440; *Littlefield v. Dingwall*, 71 Id. 228; *Artman v. Ferguson*, 73 Id. 146; *Speier v. Opfer*, Id. 85.

Charles A. Withey, for plaintiff, contended:

1. The contention of counsel for appellant is that the plaintiff is bound to follow the money after it reaches the hands of the wife, and show that it was used by her for the benefit of herself or her estate. It is conceded that if this is the law plaintiff is defeated; but it is not the law. On the contrary, it is settled that a married woman can buy, borrow, and indorse commercial paper, if the proceeds of the purchase, loan, or indorsement move to her as her own property; citing *Tillman*

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v. Shackleton, 15 Mich. 447, 455; *Campbell v. White*, 22 Id. 178, 185; *Rankin v. West*, 25 Id. 195, 201; *Franklin v. Foster*, 20 Id. 77; *Amperse v. Common Council*, 59 Id. 78; *Fafeyta v. McGoldrick*, 79 Id. 360; *Showman v. Lee*, Id. 653.

2. If it was a question of controlling importance whether or not plaintiff knew what defendants proposed to do with this money, the most that can be claimed for the testimony is that it raised a question of fact to be submitted to the jury, as the plaintiff testified simply to a want of recollection, but said repeatedly that he did not know what was to be done with the money. I contend, however, that it makes no difference whether or not he had this knowledge, because Mrs. Spencer had the necessary capacity to borrow money with which to take up or buy her husband's note, and it would be property in her hands; citing *Johnson v. Sutherland*, 39 Mich. 579; *Buhler v. Jennings*, 49 Id. 538.

GRANT, J. This is a suit upon two promissory notes executed by defendants to plaintiff.

Defendants were husband and wife. The husband applied to plaintiff for both these loans, but he would not let him have the money, because the land on which they lived was owned by the wife. It was arranged that both should execute the notes. This was done, and the money paid; plaintiff testifying that he paid it to Mrs. Spencer, and defendants testifying that he paid it to Mr. Spencer. But it is immaterial to which one the money was paid. There was no evidence in the case tending to show that the money was borrowed for the use and benefit of the wife, or for her separate estate. In fact, it was borrowed and used for the sole benefit of the husband. Neither of the defendants informed plaintiff that the loan was for the benefit of the wife, nor had he any reason to infer that it was for her benefit. In the absence of such representations by her, and the presence of the fact that the loan was for the husband's benefit, the note as to her is void.

It is true that the plaintiff testified that Mr. Spencer asked for the second loan as the agent of his wife, but

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this becomes immaterial, in view of the fact that he knowingly took the note of husband and wife. He must be held to know the law, that such a note is void as to the wife unless the money was borrowed for the benefit of her separate estate, or she has made representations which will estop her from setting up the defense.

The learned circuit judge should have instructed the jury to render a verdict for the defendant.

Judgment must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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CHARLES W. STAHELIN v. JOSEPH M. SOWLE.

Contract—Parol evidence—Rescission.

1. Where a written memorandum or agreement does not contain the entire contract between the parties, prior and contemporaneous agreements and conversations may be shown in order to prove what the whole contract was.
2. Where a contract not required by the statute of frauds to be in writing to be binding rests partly in writing and partly in parol, the whole is regarded as a parol agreement, and may be proved by oral testimony, and the jury are to determine its terms from the whole testimony. In such a case the writing is competent evidence to prove the terms of the contract, so far as they are expressed therein, and may be regarded as admissions of the facts, and, indeed, the best evidence of the facts, so stated therein.
3. In a suit to recover damages for being prevented from performing a contract, it is incumbent upon the plaintiff to make out the contract alleged in his declaration, and the burden is upon him to show performance, or, in default, that the defendant wrongfully prevented such performance.
4. Where one party has departed from a special contract for the

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delivery of specific articles from each to the other, the other party may treat it as rescinded; and if, by the terms of the contract, concurrent acts are to be performed, as to the delivery of property by one party and the payment of the price by the other, if either party refuses performance the other may treat the contract as abandoned, and justify rescission under it.

Error to Berrien. (O'Hara, J.) Argued April 17, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

Theo. G. Beaver (*Marshall L. Howell*, of counsel), for appellant.

George S. Clapp, for plaintiff.

CHAMPLIN, C. J. The declaration claims damages for being prevented from performing a contract.

The plea was the general issue, with a notice that the plaintiff had violated his agreement as mentioned and set forth in his declaration, specifying with particularity wherein he had failed to comply with the agreement, and alleging that—

"At the time the agreement was made the defendant had a large contract to furnish ties; that he purchased and owned the trees, logs, and timber on the 'Schaffer lot,' so called; that the same was purchased for the purpose of cutting up into ties; that the white-oak logs, trees, and timber thereon were contracted to plaintiff by defendant, to be cut and sawed up into ties and delivered to defendant; that plaintiff agreed to cut the same into ties for defendant; that plaintiff commenced to cut the said white-oak timber into lengths not suitable for ties, and thereby wasted the same; that plaintiff cut the white-oak logs, timber, and trees thereon, and manufactured the same into other kinds of lumber than for ties, and sold and converted the same to his own use, and deprived defendant of his profits and ties therein;" and that he is indebted to the defendant for the price and value of such trees and lumber; and that

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by reason of his not fulfilling the contract, defendant has sustained damages, which he would recoup against any claim the plaintiff might establish upon the trial."

There were two contracts declared upon in the plaintiff's declaration. The first bears date the 5th day of November, 1886, in which plaintiff agreed to move his saw-mill on to Michael Houser's land, of Bridgman, Mich., and put the mill in good running order, and saw for defendant, and no other person, as long as defendant stocked the mill, for the sum of $3 per thousand feet for all logs except tie logs. Ties were to be sawed for the sum of eight cents apiece. The side boards of the tie logs were to be sawed free and edged up. Plaintiff agreed not to buy or offer to buy any white or burr oak logs or timber for a term of 18 months, if the defendant stocked the mill. The contract contained other provisions not material to state here. The work of putting in the logs, sawing, and all work for both parties, was to be done in a workman-like manner. The plaintiff agreed to put all the logs on the Houser lot from the woods on skids at the sum of 2½ cents for each 9-foot tie, and logs at the same ratio, 2½ cents for each 9 feet in length. The parties went on under this agreement, and the plaintiff put in a certain quantity of ties, for which he received his payment in full. He claims, however, that for the timber which he cut under that contract there was due him from the defendant $124. After this job was completed, they entered into another contract, as follows:

"LAKE TP., BERRIEN CO., MICH., March 18, 1887.

"We do hereby agree to sell to Charles W. Stahelin all the white oak timber that we buy in the neighborhood of his mill, except the Joshua Feather and Walton's, at what it costs us, and charge him at the rate of ten per cent. interest from date of payment for said timber; and also agree to pay him for all of the timber

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made into M. C. R. R. ties, delivered on cars at Morris or Stevensville, if we can get the same rates at Stevensville as we have at Morris, 40 cents per No. 1, 20 cents per No 2, subject to the M. C. R. R. inspection; ties to be sawed six by ten, 9 feet long.

"J. M. SOWLE & Co."

The defendant, Joseph M. Sowle, was doing business under the name of J. M. Sowle & Co., and was engaged in getting out and furnishing ties to the Michigan Central Railroad. Upon the trial of the cause it appeared that the defendant, Sowle, purchased two parcels of land for $650, and it was estimated that the quantity of ties upon these parcels of land would be 6,500,—3,000 upon one piece, and 3,500 upon the other. The plaintiff testified that at the time the first contract was signed the defendant said to him:

"'I want you to crowd things. You are a pusher, and I want you to crowd it ahead, because I have got to have a certain amount'—I think he said—'of ties out,' so he would get his percentage, the 1st of January. The way I understood, he had three terms,—you might say three months, three distinct terms. He got in a certain amount every term; something that way."

The witness further testified:

"Either a few days before or a few days after this paper [the second contract] was made, that Schaffer piece of timber was bought. I only knew it was bought by Sowle's saying so. Sowle came to my house, and called my attention. Told me he had been over the Schaffer piece. Asked whether I was willing to stand the price,—one piece $300, and the other $350. I knew what the timber was pretty well. I was willing to pay the price. Sowle said he would send the money right away. The money came; cannot say whether it was two or three days, or a week,—a short time. Mr. Sowle's foreman went over with me. Saw Mr. Schaffer. He showed us the lines to cut the timber. When I went in first, I went to making roads. We made a road diagonally through the piece, and then cut branch roads. I kept a memorandum of the business of cutting out the roads.

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It cost me about $25. The other work cost me in the neighborhood of $25. I commenced cutting the timber off probably that very afternoon. Tucker and Schaffer showed us the line. I furnished to Sowle, at Morris Station, in the neighborhood of 1,000 ties. Did not all come from the Schaffer lot. I furnished 1,000 No. 1 ties, equal to $400."

The witness then testified tending to prove how much it cost to manufacture ties at his mill; what he paid cutters, hauling, and repairs at the mill, leather, oil, etc.; the number of teams he owned and hired, and what he had to pay for them. He also testified that his mill had a capacity and would cut in an average day's work 400 ties a day; that, after he had been at work some 13 days, he received a notification forom J. M. Sowle & Co., as follows:

"*Mr. Stahelin:* Please stop cutting and hauling. If you want to, saw what is in the yard cut at nine cents for No. 1, four and one-half for No. 2. Our contract is broken, and we have another mill to cut those logs.

"J. M. SOWLE & Co."

He further testified that he continued to cut after receiving this notice, until he was prevented by their putting a gate across the road and locking it up, and sending men there to prevent his further continuing the job.

The defendant testified in his own behalf as follows:

"My business is general lumbering. Have been in that business 42 years. Have been stocking mills in Berrien county. Know Mr. Stahelin. I made the contract mentioned here. Saw Mr. Stahelin first here in Berrien Springs in the month of October, 1886, in reference to lumber. I was cutting and shipping ties to the Michigan Central Railroad. He asked me to come down there and buy timber around his mill, and stock him up. I went down after that, and bought some timber, the latter part of October, three or four little pieces, and went to putting it into the mill at Bridgman. After I bought

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the Houser lot, he came to me twice, and wanted to do that sawing. I came to the conclusion to let him have the job and made the contract. He went to work under the contract. I came there once in two weeks, pay-day. At the last settlement we settled all up square. The account was fetched in,—so much for ties, so much a thousand feet for what lumber there was,—and we settled up everything square. There was nothing said about this extra at that time. Not a word said about it from that day to this. He never asked anything or said there was anything wrong.

"*Q.* You may state whether you had contracts then with the Michigan Central Railroad.

"*A.* Yes, sir, I had contracts with the Michigan Central Railroad.

"*Q.* Did you state the fact to Mr. Stahelin? (Counsel for plaintiff objected.)

"*The Court:* When was that?

"*Counsel for Defendant:* At the time of making the second contract. (The court thereupon sustained the objection, to which ruling the defendant excepted.)

"*Defendant's Counsel:* I offer to prove the fact that it is part of the contract, and part of the agreement entered into between these two people, that Mr. Sowle had contracts by which he was to deliver at a specified time, large quantities of ties, and Mr. Stahelin, at the time he entered into that contract, knew of the fact, and that he was to run this lumber out, and deliver these ties, so that Mr. Sowle could meet that contract, and that was one of the considerations that entered into it. (The court refused the offer, and overruled the request, and refused the testimony, to which refusal and ruling of the court defendant excepted.)

"*Counsel for Defendant:* At the time of making this contract, did you have a conversation with Mr. Stahelin in reference to your being under obligations to deliver ties to any particular persons within a certain time?

"*Counsel for Plaintiff:* I object. (The court sustained the objection, and refused to hear the testimony, to which ruling the defendant excepted. * * * * *

"*Q.* Was there any arrangement as to the time when these ties were to be cut and delivered? (Counsel for plaintiff objected that conversations occurring at the time were not admissible. The court sustained the objec-

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tion, and refused the testimony, to which ruling and refusal of the court the defendant excepted.)"

It will be noticed that the counsel for the plaintiff stated no reasons for his objections, except to the question last asked. For this fault the case might be reversed, but we have examined the record to find the reasons for the ruling of the court, and conclude that the testimony was excluded upon the ground that it is not permissible to contradict the terms of a written agreement by parol testimony, and that the court regarded the agreement signed by the defendant as containing all the terms of the contract entered into between the parties. In this we think he erred. There were five counts in the plaintiff's declaration, and, so far as any of them relate to the second contract, they do not treat it as a full and complete exposition of the intention of the parties to it. Indeed, upon its face it appears to be manifestly incomplete. In one count of plaintiff's declaration he calls it "a further supplementary agreement to the other," and avers that—

"Therein and thereby they, this plaintiff and said defendant, agreed together that this plaintiff should continue to use his mill to cut ties for said defendant, and that he should cut the same from land the timber on which was to and would be bought by said Joseph M. Sowle, who had the means wherewith to purchase the same, and who would buy timber in the vicinity of plaintiff's mill."

In another count, after setting up the substance of the first contract, the plaintiff continues as follows:

"That afterwards, intending to continue such contract, and make sure of the labor of this plaintiff, the said defendant agreed to buy other timber in the vicinity of plaintiff's mill, and did buy one piece of land of John Schaffer and another of Gottlieb Schaffer, and contemplated buying other timber, all in the vicinity of this

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plaintiff, and that this timber should be resold to this plaintiff for the sum he paid, but on credit, and at ten per cent. interest, until such time as this plaintiff could reasonably pay the same with his labor; and agreed that, for all ties manufactured out of such timber, he would pay forty cents to this plaintiff at Morris Station, and would resell all such timber bought by him in plaintiff's vicinity, meaning for said eighteen months from November 5, 1886."

In another count he alleges that—

"Said Joseph M. Sowle further agreed with this plaintiff that he would buy the timber in the vicinity where was this plaintiff's mill, to stock his said mill, and that he would resell all such timber to this plaintiff on credit, charging this plaintiff ten per cent. interest, to be paid, if he chose, in ties to be furnished, and that he would pay this plaintiff at Morris Station or at Stevensville 40 cents for No. 1 ties, and 20 cents for No. 2 ties, delivered on the cars; the ties to be sawed six by ten inches, nine feet long. An exception was made of the timber of Joshua Feather and one Walton only. A paper in duplicate (Schedule B) was made between the parties, and signed by them; the said parties contemplating that for the ensuing thirteen months, and a little over, said Joseph M. Sowle would buy timber sufficient to stock the mill of this plaintiff, to be sawed into ties, and resell the same to this plaintiff, so that he could keep his mill in operation during all the time, and saw ties for said defendant, and furnish and sell the same to said defendant on the cars at Morris Station at the rate of 40 cents and 20 cents, as aforesaid."

In another count he alleges as follows:

"That thereafter, and on the 18th day of March, 1887, defendant requested this plaintiff to further agree with him, as is set forth in a writing signed by him, and delivered by him to plaintiff, of which Schedule B is a copy; that this plaintiff thereupon acceded to said request, and received said writing, so that it was agreed between them, as therein written, that plaintiff would continue to use his mill in the interest of defendant, and for him, and no one else, would manufacture ties, and sell them to defendant, delivered at Morris Station

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and Stevensville, at 40 cents for No. 1 ties, and 20 cents for No. 2 ties; that plaintiff would buy from defendant, and take off his hands, all the timber, and said defendant would sell to plaintiff all the timber, which defendant would and could purchase in the vicinity for manufacturing, and that plaintiff would pay defendant therefor the amount of the purchase money of and for such timber, and ten per cent. interest upon the purchase price thereof, except one piece of Joshua Feather and one of one Walton."

It is therefore apparent, from the plaintiff's theory, that the written memorandum or agreement signed by defendant does not contain the whole of the contract between the parties, and it follows that previous and also contemporaneous agreements and talks may be shown in order to prove what the whole contract was. It is only where the contract is complete in itself, and shows upon its face that it embodies the terms of the agreement, that parol testimony which tends to vary or contradict the writing is excluded, as well as all previous negotiations and understandings. Where, however, a contract which is not required by statute to be in writing to be binding is partly in writing and partly parol, the whole is regarded as a parol agreement, and may be proved by oral testimony, and the jury are to determine from the whole testimony what the terms of the contract are. *Sheffield v. Page,* 1 Spr. 285; *Webster v. Hodgkins,* 25 N. H. 128; *Houghton v. Carpenter,* 40 Vt. 588; *Hope v. Balen,* 58 N. Y. 382; *Wentworth v. Buhler,* 3 E. D. Smith, 305; *Potter v. Hopkins,* 25 Wend. 417; *Crane v. Association,* 29 N. J. Law, 302; *Miller v. Fichthorn,* 31 Penn. St. 252; *Glenn v. Rogers,* 3 Md. 312; *Randall v. Turner,* 17 Ohio St. 262; *Kieth v. Kerr,* 17 Ind. 284; *Johnston v. McRary,* 5 Jones (N. C.), 369; *Perry v. Hill,* 68 N. C. 417; *Moss v. Green,,* 41 Mo. 389. The writing, in such a case, is competent evidence to prove the terms of the contract, so far as they are

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expressed therein, and may be regarded as admissions of the facts, and, indeed, the best evidence of the facts, so stated therein.

In this agreement nothing is said of the agreement that Stahelin should continue to use his mill to cut ties for Sowle from land that Sowle was to buy in the vicinity of the plaintiff's mill, as claimed in the first count of plaintiff's declaration; nor the purpose for which the second contract was made, and the other particulars, as claimed in the second count; nor the special agreement relative to buying timber to stock plaintiff's mill, and resell on credit, to be paid, if chosen, in ties, and that for 13 months and over defendant should buy sufficient timber to stock said mill, to be sawed into ties, and resell to plaintiff, so that he could keep his mill in operation all the time, and saw ties for the defendant and furnish and sell the same to him on the cars at Morris Station at 40 and 20 cents. Nor does the writing specify that the defendant shall buy timber, nor when; nor when the plaintiff shall pay; nor that plaintiff shall manufacture all timber suitable for ties into ties for defendant; nor when they shall be so manufactured, nor when delivered. Since it is apparent from the face of the writing, and also, as both parties claim, the writing does not contain the whole contract, the writing is not subject to the rules of construction relative to reasonable time which are applicable to contracts which are complete, and contain the whole agreement of the parties. Here parol testimony is admissible to prove any stipulation which is not expressly stated in the writing, and to supply all the terms of the contract, and, if a time was agreed upon verbally in which the ties should be cut and delivered, it was competent to show it as affecting the defendant's right to rescind. If defendant did not have the right to rescind, he did not have the

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right to recoup. No person can recoup damages growing out of a contract which he has wrongfully prevented the other party from performing.

It was incumbent upon the plaintiff to make out the contract alleged in his declaration, and the burden of proof was upon him to show performance, or, in default, that the defendant wrongfully prevented him from performing; and while the burden of showing a sufficient cause to warrant him in rescinding the contract was upon the defendant, yet such defense could be shown under a plea of the general issue.

Where one party has departed from a special contract for the delivery of specific articles from each to the other, the other party may treat it as rescinded; and if, by the terms of the contract, concurrent acts are to be performed, as the delivery of property by one party and the payment of price by the other, if either party should refuse to perform his part of the contract the other may treat the contract as abandoned, and justify rescission under it. *Fletcher v. Cole,* 23 Vt. 114; *Goodrich v. Lafflin,* 1 Pick. 57; *Dubois v. Canal Co.,* 4 Wend. 285; *Hall v. Rupley,* 10 Penn. St. 231; *Moulton v. Trask,* 9 Metc. 577; *Derby v. Johnson,* 21 Vt. 17; *Hoagland v. Moore,* 2 Blackf. 167; *Goodman v. Pocock,* 15 Adol. & E. (N. S.) 576; *Webster v. Enfield,* 5 Gilman, 298; *Webb v. Stone,* 24 N. H. 288.

The claim on the part of the defendant was that the agreement was made with special reference to the contract which he had entered into with the Michigan Central Railroad Company to deliver ties to that company in a specified time, and the plaintiff was to get out and deliver the ties on this land to enable him to perform his contract, and the defendant was proceeding to fulfill his contract in this regard, and, in order to enable him to fill such contract, he did, on plaintiff's default, rescind the agreement with him, and obtain the sawing to be

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done at another mill. He also claims that plaintiff was not manufacturing all the timber into ties which was suitable for that purpose. The defendant should have been permitted to prove what the terms of the entire contract were, and then it should have been left to the jury, under proper instructions, to find—

1. What the entire contract was;
2. Whether plaintiff wrongfully neglected or refused to perform the terms and conditions on his part; and, if they so find, then—
3. Whether defendant was justified, by reason of plaintiff's violation of the contract, in rescinding the same. *Pontifex v. Wilkinson*, 1 Man., G. & S. 75.

If, under such instructions, plaintiff was entitled to recover, the charge of the court relative to plaintiff's damages laid down the correct rule.

For the error of the court in rejecting testimony tending to show the terms of the entire contract between the parties, the judgment must be reversed, and a new trial ordered.

The other Justices concurred.

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GEORGE H. HILL v. FRANK L. WARRELL AND JAMES B. GRADY.

Municipal corporations—Assessment for improvements—Non-resident lands—Validity of deed.

1. The words "unoccupied" and "vacant" are words of the same import.
2. The word "occupied," as used in the tax law of Michigan, does not signify the same as "seated" or "surveyed," as used in the tax laws of some of the other states.

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3. Unoccupied premises are vacant premises, meaning that there is no one in the actual possession exercising any acts of control over the premises, or any part thereof.[1]

4. The provision of the charter of the city of Grand Rapids, requiring unoccupied lots or parts of lots belonging to a resident of the city to be assessed to and in his name, is mandatory, and a non-compliance with such requirement will render the assessment void.

So *held*, where the lot was assessed in the name of the wife of such owner.

5. The further provision of said charter that, in case such unoccupied premises belong to a non-resident, they shall be entered accordingly, as is required by law in case of assessments by supervisors of townships, is also mandatory, and a failure to list the lot or lots as non-resident land on a part of the roll separate from the resident land will invalidate the assessment.

Error to Kent. (Grove, J.) Argued July 2, 1891. Decided July 28, 1891.

Ejectment. Defendants bring error. Affirmed. The facts are stated in the opinion.

William Wisner Taylor and *Lawrence E. Carroll*, for appellants.

Uhl & Crane, for plaintiff.

CHAMPLIN, C. J. This is an action of ejectment, brought by George H. Hill against Frank L. Warrell and James B. Grady to recover the premises described in the plaintiff's declaration. He claims title in fee. The defendants pleaded the statutory general issue. The case was tried before the Honorable Willian E. Grove and a jury. After the testimony was closed, the court took the case from the jury by directing a verdict for the plaintiff.

The plaintiff introduced in evidence conveyances showing a chain of title from the United States to him. He

[1] See *Murray v. Hudson*, 65 Mich. 670.

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also introduced a deed executed by the city of Grand Rapids, bearing date June 17, 1874, and recorded July 31, 1874, to George H. and William E. Hill. William E. Hill conveyed to George H. Hill, May 24, 1877. This latter deed I do not find it necessary to pass upon.

The defendants claim title adversely to the plaintiff by virtue of certain titles derived from the city of Grand Rapids under sales for assessments levied for street improvements, sewers, and sidewalks. The validity of these titles was the main issue in the case.

Plaintiff claims that none of the deeds relied upon by the defendants were valid, for the reason, first, that at the time the assessments were imposed the owner was a non-resident, the land unoccupied, and the assessment rolls were made in violation of the charter, which required non-resident and unoccupied land to be assessed in a separate part of the roll as non-resident; whereas in the rolls they were assessed and listed as the lands of residents, and occupied.

Testimony introduced showed without contradiction that the plaintiff, George H. Hill, at the time of the several assessments, was a non-resident, and also that the premises were unoccupied, and that this was their condition when the assessments were levied and when the lands were sold. It showed also that the lot was inclosed, and that there was part of an old orchard upon it; and it further appeared without contradiction that, during the time referred to, the lot was vacant, there were no buildings upon it, it was uncultivated, and no one was in the actual possession or occupation thereof. Under such facts the land is regarded as unoccupied. The word "occupied" does not signify the same as "seated" or "surveyed" in the tax laws of some other states. This statute requires the land to be assessed to the owner or person in occupation; and, if no one was in the actual

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occupation, and the owner did not reside in the city, and could not be ascertained, then it was required that it should be assessed as unknown. The words "unoccupied" and "vacant" are words of the same import. Unoccupied premises are vacant premises, meaning that there is no one in the actual possession exercising any acts of control over the premises, or any part of them. That this is the meaning of the statute is further apparent from section 45 of title 6, which states that—

"In cases where there is no agreement to the contrary, the owner or landlord, and not the occupant or tenant, shall be deemed in law the person who ought to bear and pay every such assessment made for the expense of any public improvement in the said city."

The orchard was a permanent improvement, the same as a well would be, and, if no one gathered fruit or drew water from the well, nor planted a crop, nor pastured the land, it would be unoccupied or vacant, although inclosed by fences.

In one of the assessments, to wit, that for the construction of a sewer in Division street from Blakeley avenue to Withey street, the premises were assessed to Barbara Berger; but the testimony is that Barbara did not occupy it, and that she was not the owner of it, and so in this respect the statute was not complied with.

It appeared in the plaintiff's chain of title that Darwin E. Aiken and wife conveyed the premises by deed, March 9, 1870, to Andrew Berger, of the city of Adrian, Mich.; that on the same day Andrew Berger and Barbara Berger, his wife, of the city of Adrian, executed a mortgage upon the premises to William E. and George H. Hill, of Detroit. Both of these instruments were recorded March 11, 1870, and the plaintiff's chain of title comes through a deed from the sheriff of Kent county, dated June 7, 1873, to William E. and George H. Hill. This

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deed became operative June 7, 1874, and William E. Hill conveyed to George H. Hill, May 24, 1877. These dates show that when the premises were assessed prior to June 7, 1874, the title was in Andrew Berger, and after that date, to May 24, 1877, the title was in William E. and George H. Hill, and after that date it was in George H. Hill; having reference now to the chain of the original title, as put in evidence by the plaintiff. These may be considered, for the purposes of this case, as three separate periods.

The defendants' chain of title originated in four assessments. The assessment for a construction of a sewer in Division street from Blakeley avenue to Withey street, while Andrew Berger was the owner of the property, falls in the first period; the assessment for a sewer in Wenham avenue, made in 1876, falls in the second period, while William E. and George H. Hill were joint owners; and the assessment for the construction and repair of a sidewalk, made in August, 1877, and the assessment for the construction of a sewer in Prescott, South Division, Blakeley avenue, Center, and Pleasant streets, made in 1878, fall in the last period, while George H. Hill was the owner of the premises.

The charter of the city, under which all these assessments were made, provides that—

"In case any lots or parts of lots shall be unoccupied, belonging to any person residing in the said city, such person shall be assessed for the same, and his name entered accordingly; and in case such lots or parts of lots shall belong to a non-resident or owner or owners unknown, the same shall be entered accordingly, with a description of such lots or premises, as is required by law in assessment rolls made by supervisors of towns, with the value thereof, and the amount assessed thereon," etc.

The charter further provides that—

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"Deeds on all sales for assessments assessed upon real estate under this title shall be acknowledged as other conveyances, and, when executed and acknowledged as aforesaid, shall vest the fee of the land in the purchaser, and such deed shall be deemed and taken to be *prima facie* evidence of the existence and regularity of all such prior proceedings as might otherwise be required to be proven in order to establish a title in the purchaser."

The burden of proof is, therefore, on the plaintiff to show that there was any irregularity which affected the jurisdiction of the city to levy and collect the assessment.

The plaintiff introduced testimony which, as counsel claim, tended to show and did establish that the positive injunctions of the statute had not been complied with, first, in not assessing the premises to the owner, or, if occupied, to the occupant; and, further, in not assessing the lands of non-residents in a separate list. It is claimed that the testimony shows beyond dispute that the premises were not occupied during any period when the land was assessed. I think the record establishes that fact conclusively.

Plaintiff's counsel also claim that, during the first period, the land not being occupied, the assessment should have been to the owner, namely, to Andrew Berger, who, the record discloses, was the owner. It was assessed in one instance to Barbara Berger, who was neither the owner nor occupant. I think the requirements of the statute in this respect are mandatory. There are good reasons existing why, in the proceedings to levy assessments declared to be liens, and the sale for non-payment, and which are followed by such severe consequences as the loss of the fee, the statute should be complied with. After the names are returned against whom the assessments are made, the clerk advertises, giving notice of the time and place when the council will hear appeals. In this instance the names only are required to be pub-

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lished, and, if the owner or occupant is not named, the notice is misleading, and has no validity. The names are required to be stated in the return of the marshal of the uncollected taxes. Indeed, this requirement is a substantial part of the proceeding, and intended for the protection of the owner. It cannot be dispensed with, and the neglect to comply with the statute renders the proceedings as to such owner void, and no title can be based thereon. This disposes of the deed resting upon the validity of the assessment for the construction of the sewer in Blakeley avenue to Withey street.

The testimony in the case shows that the assessment upon which the second deed is based was made to George H. and William E. Hill under the head or name of "Owner or occupant." These persons were shown to have been the owners, but no person was shown to have been in occupation of the premises. Testimony was introduced for the purpose of showing that they were non-residents of the State and of the city at the time the assessment was made, and such testimony was sufficient to prove the fact in the absence of any contradictory evidence. The statute requiring the assessments to be made in the same manner as those of townships, it was a part of that requirement that non-resident land and unoccupied should be placed in a separate list on the roll from that in which the lands of residents are entered. It was conceded in this case that the land in controversy was not assessed as non-resident, and not entered on a part of the roll separate from that upon which the estates of residents were entered, and that the non-resident lands were not assessed in separate parts of this roll from the resident lands. It is only when the owner resides in the city, if the premises be unoccupied, that his name can be entered and the assessment made to him among the resident owners of property. The

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statute is express that, if the premises belong to a non-resident, they are to be entered accordingly. The record shows that the statute was not complied with, and consequently the deed based upon this assessment cannot be held to have conveyed the fee to the defendants.

Two deeds are based upon the proceedings included in the third period. The first assessment was for the construction of a sidewalk. At the time this assessment was made George H. Hill was the owner of the premises. The assessment, however, is made out against George H. and William E. Hill, and it is stated in the record that—

"The land in controversy in this case was not assessed as non-resident, and not entered upon a part of the roll separate from that upon which the estates of residents were entered. The non-resident lands were not assessed in a separate part of the roll from the resident lands in said last-mentioned assessment roll."

This assessment comes under the same provisions of law as those regarding the one last above.

The other assessment for the construction of a sewer, was made against George H. Hill, and the provisions invalidating the second assessment apply to this also.

It follows from what has been said that each of the titles relied upon by the defendants is invalid, and that the judgment below in favor of the plaintiff was correct. This renders it unnecessary to consider the other points raised, as they become immaterial in the decision of the case.

The judgment must be affirmed.

The other Justices concurred.

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ELIZABETH DOTY v. WELLINGTON POSTAL, FRANK S. POSTAL, AND ORVILLE M. BUSH.

Intoxicating liquors—Civil damage act—Evidence.

1. In a suit by a wife against a saloon-keeper and his bondsmen to recover damages sustained by reason of the killing of her husband by an intoxicated person, alleged to have procured his liquor of the defendant saloon-keeper, evidence showing that the slayer of the husband was a person in the habit of becoming intoxicated is admissible for the purpose of showing that the sale of the liquor was unlawful.
2. Where the evidence in such a case is contradictory as to which party to the affray was the aggressor, the question should be submitted to the jury.
3. It is not for the plaintiff to produce proof, or for the jury to speculate, upon the probabilities whether the intoxication of the husband's slayer was the natural cause of the killing. The act itself fixes defendant's liability, if the sale of the liquor was wrongful.

Error to Osceola. (Judkins, J.) Argued May 14, 1891. Decided July 28, 1891.

Case under civil damage act. Plaintiff brings error. Reversed. The facts are stated in the opinion.

C. H. Rose (*C. A. Withey*, of counsel), for appellant.

Sayles & Trumbull (*Edward Cahill*, of counsel), for defendants.

LONG, J. This is an action brought in the circuit court for the county of Osceola by Elizabeth Doty as plaintiff, against Wellington Postal, Frank S. Postal, and Orville M. Bush as defendants, to recover damages sustained by her to her means of support, occasioned by the death of her husband, Frank Doty, which death was

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caused by the intoxication of Seymour Bailey and others at the saloon of defendant Wellington Postal. Seymour Bailey, while so intoxicated, shot and killed the husband of plaintiff. The action is based upon section 20, Act No. 313, Laws of 1887 (3 How. Stat. § 2283 *e* 3). The defendant Wellington Postal is the principal, and Frank S. Postal and Orville M. Bush, the other two defendants, are sureties upon his liquor bond, which bond bears date the 26th day of May, A. D. 1888, and is executed, duly approved, and filed in conformity with the statute. The intoxication and death occurred on or about the 6th day of April, A. D. 1889, at which time the said defendant Wellington Postal was the keeper of a saloon in the village of Evart, and was doing business under the bond sued upon.

It is claimed by counsel for the plaintiff that the proofs tend to show that on the evening of tht 6th day of April, 1889, Seymour Bailey, George Bailey, Harvey Smith, James Curry, and James Powell, who resided in and around the village of Sears (a small place lying three miles east of Evart), came to Evart, and were together during that evening, and purchased and drank liquor at defendant Postal's saloon and at other places in Evart. About 10 o'clock that evening these parties from Sears finally congregated on Main street of the village of Evart, near a mill where the F. & P. M. Railroad track crosses the street east and west; Main street running north and south, the mill standing on the east side of Main street, facing the west. While these five boys were engaged in a noise and disturbance, the plaintiff's husband and some other parties, who were at that time in a hotel which was situated on the west side of Main street, and some distance north from where this Sears crowd had congregated, having their attention attracted by the noise, came out of the hotel, went

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across the street, and down where this crowd was. The railroad track before mentioned leads east from Evart through Sears, said track being the usual route taken by these boys going home. As they saw these parties coming across the street from the hotel, the Sears party started up the track east towards home, Seymour Bailey, the person who shot plaintiff's husband, and George Bailey, remaining behind the rest; and when the plaintiff's husband and Seymour Bailey met or came together, Bailey shot and killed plaintiff's husband. He fired two shots at him in rapid succession, only a second or two intervening, one of which entered the cheek of deceased just below the eye, passing through the brain, lodging against the skull, causing his immediate death.

It was claimed by the defense that Bailey was hit by the deceased in the face on their first coming together, and the theory of the defense was that Bailey shot and killed plaintiff's husband in self-defense; that Doty, the deceased, was the aggressor in the affray, and, he (Doty) being the aggressor, the plaintiff could not recover, even though Bailey was drunk at the time of the shooting; while the plaintiff's theory was that Bailey was the aggressor, and not Doty; and, further, that it made no difference whether Bailey or Doty was the aggressor,—if Bailey was intoxicated at the time of the shooting, and became intoxicated, in whole or in part, from liquors procured at the defendant's saloon, then a right of action had accrued in favor of the plaintiff; and, further, that the plaintiff was entitled to go to the jury on the questions of fact presented in the case, whether the drunkenness of Bailey was the cause of the shooting and death, and whether there was any connection between the intoxication of Bailey and the shooting of Doty, and whether the same thing would have happened had Bailey not been

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intoxicated, and whether the shooting of Doty was in any manner traceable to the intoxication of Bailey.

About five hours after the shooting an officer arrested Bailey at his home, which was about five miles from Evart, and found in his pocket a revolver, and a large stone the size of a man's fist.

At the time plaintiff's husband was shot and killed he was 23 years of age, sound, healthy, and industrious, and was plaintiff's only means of support.

After the plaintiff had rested her case, the court held that there could be no recovery in the case as against the sureties on the bond, for the reason that the plaintiff had not shown that Bailey was a person in the habit of getting intoxicated, and therefore the sale of the liquor to him was not an unlawful sale, and would not raise a liability against the sureties. The court also held that Doty was the aggressor, and for that reason the plaintiff could not recover. The defendants offered no testimony in the case, but at the close of the plaintiff's proofs also rested their case.

It appears from the record that the plaintiff offered upon several occasions during the progress of the trial to show that Seymour Bailey, who killed the plaintiff's husband, was a person in the habit of getting intoxicated, but was not permitted to make this proof, the court holding that, unless he was intoxicated upon the night in question by liquors procured at defendant Postal's saloon, the fact that he was a person in the habit of getting intoxicated was wholly immaterial. The court stated in this connection that—

"The case might arise where the mere fact that he was in the habit of getting intoxicated would support an action. In this case the gist of the action is the death of this man. You claim the loss of support by reason of his death purely and simply, and nothing else arising

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from the sale of liquor by the defendant to this man who did the killing. There is the proposition, clear enough. Before you can recover you must show, *first*, that the liquor was furnished by the defendant to this man who did the killing; and, *second*, that he was intoxicated at that time, and, by means of it, he took that man's life by reason of it; and then the consequential damages."

The court for this reason expressed the opinion that no recovery could be had against the sureties upon the bond. The court did not rest the case wholly upon this question in directing the jury to return a verdict in favor of the defendants. He charged the jury further as follows:

"If I keep a saloon, and a man comes into it drunk and intoxicated, and gets liquor, and then goes out and gets to quarrelling with another, and it is pretty difficult to tell who is to blame, they get into a row, and one is hurt and injured, the courts say that the jury cannot speculate much in a case of that kind to find out who is to blame, as the saloon-keeper is in fault, and I take it an action will lie. When, however, the party who is injured is confessedly the aggressor from first to last, and stands in the wrong, then no action will lie for his injury, even if the other man is drunk or sober. It cannot be said in that case that it is a necessary or natural result of the intoxication."

The court further charged the jury that "the proofs show that Doty was the aggressor."

The court was clearly in error in ruling out the evidence offered to show that Bailey was a person in the habit of getting intoxicated. This was competent for the purpose of showing the unlawful sale to Bailey by defendant Postal. Clearly, the defendant Postal, as well as the sureties upon his liquor bond, would be liable, if the sales made by Postal were unlawful, for all damages resulting from such sales, as the bond is given for the purpose of protecting parties from damages resulting by

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reason of such unlawful sales. *Bell v. Zelmer*, 75 Mich. 73.

The court was also in error in holding that Doty was the aggressor. That was a question of fact for the jury, under the testimony which was offered in the case. The testimony was contradictory upon this point. The plaintiff contended that Doty went out simply to inquire into the cause of the noise and disturbance made by the Sears party, and was wantonly shot and killed by Seymour Bailey, without provocation, and that Doty was not the aggressor.

The action was brought under section 20, Act No. 313, Laws of 1887. This section provides that—

"Every wife * * * who shall be injured in person or property or means of support or otherwise by any intoxicated person, or by reason of the intoxication of any person, or by reason of the selling, giving, or furnishing any spirituous, intoxicating, fermented, or malt liquors to any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating or malt liquor, have caused or contributed to the intoxication of such person or persons, or who have caused or contributed to such injury, and the principal and sureties to the bond hereinbefore mentioned shall be liable, severally and jointly, with the person or persons so selling, giving," etc.

In *Brockway v. Patterson*, 72 Mich. 122, it appeared that Brockway, the husband of the plaintiff, was killed by one Lane; that Brockway and Lane became intoxicated with liquors procured at the saloon of defendant, Patterson, and by reason of the drinking of which Lane struck Brockway a blow, causing his death. It was contended in that case that the injury to Brockway, which resulted in his death, could not be considered as a natural and legitimate result of the selling of the liquor, or the intoxication that resulted from drinking it. Plaintiff's counsel contended in that case that it was not necessary to trace

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the injury to the intoxication; that the fact of intoxication was enough; and that, if Lane was intoxicated when he struck the blow that caused the death of Brockway, the case comes within the express words of the statute, which reaches any injury to the wife's means of support by any intoxicated person. That action was brought under Act No. 191, Laws of 1883, which contains a provision similar to section 20 of the act under which the present suit is brought. It was said by Mr. Justice MORSE in that case that—

"Plaintiff's counsel cites *Neu v. McKechnie*, 95 N. Y. 632, which fully supports the plaintiff's contention. It is there held expressly that it is not essential to maintain an action of this kind that the plaintiff must show that the act of the intoxicated person which caused the injury was the natural, reasonable, or probable consequence of his intoxication. It is sufficient if it appears that the act was done while the person was intoxicated, in whole or in part, by liquors sold by the defendant. In my opinion, this construction of the statute is the only proper one."

The court below in that case directed the jury that they must find the injury to have resulted from the intoxication of Lane, and that they must find that the intoxication of Lane was so connected with his act of striking the blow that they could say, according to reason, observation, and experience, the intoxication of Lane was the efficient cause of the blow, and that the result must be fairly traced to Lane's intoxication. It was held by this Court in that case that the instruction given to the jury was sufficiently favorable to the defendant.

The question was raised in that case whether the action could be maintained, although the sales of liquors to Lane and Brockway were lawful; but it appeared in that case that the liquors were furnished to both of them after they had become intoxicated, and therefore the question as to lawful sales was not involved in that case,

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and this Court did not pass upon it.[1] In the present case testimony was offered to show unlawful sales by defendant Postal to Seymour Bailey, by reason of his being a person in the habit of getting intoxicated. The liquor bond of defendant Postal expressly provides that no sales shall be made to this class of persons. It also appeared in *Brockway v. Patterson, supra,* that Lane and Brockway had a quarrel on their way home after the drinking of the liquor furnished them by defendant, after they had become intoxicated; that Brockway struck Lane twice, and Lane hit Brockway with a stone just above and back of the left temple, which resulted in Brockway's death. The judgment in that case was affirmed.

In *Thomas v. Dansby,* 74 Mich. 398, plaintiff's husband, in an altercation with one Free, was injured by the breaking of his leg, whereby he became unable to support and maintain the plaintiff. It appeared that Thomas and Free were persons in the habit of becoming intoxicated, to the knowledge of defendant, before the time of selling them the liquor which resulted in the injury. A recovery was had in that case by the plaintiff, and the judgment affirmed in this Court. It was there said:

"If the injury was occasioned by reason of the intoxication of Thomas or Free, and such intoxication was produced in whole or in part by the liquors sold or furnished by defendant Dansby, then the case would fall within the terms of the statute, and a recovery could be had if the plaintiff by reason thereof was injured in her means of support."

Counsel for defendant attempted to distinguish the present case from *Brockway v. Patterson,* 72 Mich. 122, from the fact that it appeared in that case that Brockway, and Lane, who assaulted him and caused his death,

[1] See *Peacock v. Oaks,* 85 Mich. 578.

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were both intoxicated by liquors furnished them by the defendant; and also to distinguish the present case from *Thomas v. Dansby*, 74 Mich. 398, by reason of the fact that Thomas and Free were both intoxicated by liquors furnished by defendant. We are unable to discover how such a distinction can relieve the defendant in the present case from liability. If, upon a fair submission of the case to the jury, they should find that the death of the plaintiff's husband was occasioned by the unlawful furnishing of liquors to Seymour Bailey by defendant Postal, he, as well as the sureties upon his liquor bond, would be liable for the damages suffered by the plaintiff by reason of the death of her husband.

It is urged in the argument here that the plaintiff's husband was the aggressor, and no recovery can be had by plaintiff for that reason. But that was a matter in dispute upon the trial, and was a question for the jury.

Some of the testimony tended to show that Seymour Bailey, by reason of his intoxication, shot and killed the plaintiff's husband, and that he and not Doty was in fault. These are questions that must be submitted to the jury for their determination. The plaintiff was, under the ruling of the court, shut out from presenting these issues. In this the court was clearly in error.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

The other Justices concurred.

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REBECCA L. CRITTENDEN AND EDWARD G. CRITTENDEN, BY CHARLES D. CRITTENDEN, THEIR NEXT FRIEND, v. ARTHUR L. CANFIELD AND FRANK H. CANFIELD.

Mortgage—Deed absolute in form—Equitable title—Surrender of claim by parol—Gift—Principal and agent—Infants —Action by next friend—Costs.

1. One having a personal interest in the result of a suit which he institutes in the name of infant complainants, who are also interested, he acting as their next friend, will be charged with the costs in case the bill is dismissed.
2. The rule is well settled that a right resting in parol may be surrendered or extinguished by parol.

   So *held*, where a husband, who was equitably entitled to a reconveyance of 20 acres of land which he had conveyed to his brother by a deed absolute in form, but intended as a mortgage, in anticipation of approaching death directed that the land be reconveyed to his wife, which was done; which deed is held to have vested the title to the land in the wife as effectually as if taken in the name of the husband, and he had deeded directly to the wife, in consideration of love and affection, and in anticipation of approaching death.
3. A debtor, in anticipation of approaching death, sent an agent to adjust the claim of his creditor, to whom he had conveyed 20 acres of land many years before, and after the debt was incurred, by a deed absolute on its face, of which fact the creditor (a brother of the grantor) was first advised on receiving the deed by mail after it had been recorded, there being no agreement or understanding between them as to its execution. The agent, who was also directed to secure a reconveyance of the land, adjusted the claim, and took a quitclaim deed of the land in the name of the debtor's wife, and on his return made his report and exhibited the deed to his principal, who expressed himself as satisfied, and thereupon executed a deed to his only child, a daughter, of other land owned by him. And it is held that in the absence of any showing that the agent disobeyed his instructions, or of collusion with the wife, he will be presumed to have acted in good faith, and in

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accordance with his instructions, and the principal will not be presumed to have been ignorant of the action of his agent.

Appeal from Oakland. (Moore, J.) Argued June 3, 1891. Decided July 28, 1891.

Bill to declare a deed to have been given as security, and for other relief. Complainants appeal. Decree dismissing bill affirmed. The facts are stated in the opinion.

Baldwin, Draper & Jacokes (*A. E. Chadwick* and *B. R. Erskine*, of counsel), for complainants.

Moore & Canfield, for defendant Frank H. Canfield.

Eldredge & Spier, for defendant Arthur L. Canfield.

McGRATH, J. Complainants are the minor children of Martha W. and Frank E. Crittenden. Martha W. Crittenden was the daughter of Edward C. and Elizabeth K. Gallup. Elizabeth K. Gallup was the daughter of Christian Clemens. Edward C. Gallup died August 28, 1877, leaving Elizabeth K. Gallup, his wife, and Martha W. Gallup, an only child, then 26 years of age. Martha married in 1880, and died in 1887, leaving surviving her complainants and Thomas C. Crittenden. Thomas died in October, 1887. Elizabeth K. Gallup died testate, April 5, 1889. By her will, executed June 18, 1887, Arthur L. Canfield was made executor, and the property in question was devised to defendants in trust for complainants and said Thomas C. Crittenden. The will provided that the homestead should be conveyed to Rebecca L. Crittenden when she should become of age, and that, when the youngest survivor of her grandchildren should arrive at the age of 21, all of said property then remaining, after deducting the homestead, should be divided between said grandchildren, or the survivors of them; that, in case said Rebecca L. should die before arriving at the

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age of 21 years, the homestead should be divided between the survivors; that, in case all of said grandchildren should die without issue before the distribution provided for, the estate then remaining should be distributed between the heirs at law of the testatrix, as though she had died without issue.

Christian Clemens died in 1844, leaving, as his sole heirs at law, four daughters,—Harriet, wife of George Lee; Ann, wife of William Canfield; Elizabeth K., wife of Edward C. Gallup; and Louisa M. Clemens. In 1841, Christian Clemens, intending thereby to make an *ante mortem* disposition of his property for the benefit of his daughters, conveyed by deed to his sons-in-law and Louisa M. Clemens, as tenants in common, certain real estate, including the land in question, which contained 20 acres, which is now a part of the city of Mt. Clemens. After the death of Clemens, the said grantees partitioned the property so conveyed, and this 20 acres was assigned to Edward C. Gallup, who with his wife and family occupied it from 1844 until his death. In 1856, Edward C. Gallup and wife gave to his brother, James Gallup, a deed of this 20 acres, and on August 24, 1877, James conveyed the same to Elizabeth K.

The bill claims that the deed to James was a mortgage to secure the payment of an indebtedness due James; that this indebtedness was adjusted four days before the death of Edward C. Gallup; that the deed from James to Elizabeth was not delivered until after the death of Edward, and that Elizabeth, through Arthur L. Canfield, one of the defendants, fraudulently procured the deed to herself, instead of to Edward; that Martha W. was the only heir of Edward C.; that complainants are the legal heirs of Martha W.,—and asks that the conveyance from Edward to James be decreed to be a mortgage; that the same be declared to be fully paid by Edward; that the

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deed to Elizabeth be declared to be in fraud of complainants' rights; and that the title to the residue of the 20 acres may be decreed to be vested in complainants.

The answer sets up that, at the time of the conveyance by Edward to James, Edward was financially embarrassed, and that the object of the conveyance was to protect the property from Edward's creditors. It admits the indebtedness to James, but insists that the indebtedness arose some years before the deed of conveyance; that the deed from James to Elizabeth was procured at the instance and express direction of Edward C., and without fraud, and that the same was procured and delivered to Elizabeth before the death of Edward, and that such delivery was made in the presence of, and with full knowledge and by the direction of, Edward, and that at the time of the procurement of said deed the indebtedness to James was adjusted by the payment to him of the sum of $850 out of moneys furnished by Elizabeth.

It must be conceded that, in 1853, Edward became indebted to James in the sum of $2,500; that prior to the 24th day of August, 1877, Edward had paid upon this indebtedness over $2,000; that, in the spring of 1856, Edward embarked in a mercantile enterprise at Milwaukee, and, anticipating possible failure, executed in April, 1856, the deed to James; that said deed was not recorded until September 29, 1856; that said James had no knowledge of the execution or recording of said deed until the same was sent by mail to him at New York, nor was there any understanding between James and Edward as to the execution of said deed; that, on the same day upon which said deed to James was recorded, another deed of other property from Edward to another brother was also recorded, and about a year afterwards the other property was reconveyed to Edward, but the deed reconveying was not recorded until January 22, 1858, on which

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day another deed running from Edward and wife of the same property to one French was also recorded; that Edward C. Gallup died August 28, 1877; that, four or five days before his death, Arthur L. Canfield, one of the defendants, was employed by Edward C. Gallup to go to Grand Rapids, where James Gallup then resided, adjust the matter of the indebtedness of Edward to James, and procure a deed of the 20 acres from him; that said Canfield did go to Grand Rapids, did adjust the indebtedness, and on the 24th day of August, 1877, procured a deed from James Gallup to Elizabeth K. Gallup, and, returning to Mt. Clemens, reported to Edward and exhibited to him the deed; that the indebtedness from Edward to James was settled by the payment of $850, the balance of which was sent to James after the death of Edward, as appeared from the following receipt signed by James, and sent to Arthur L. Canfield:

"OFFICE OF JAMES GALLUP,
"GRAND RAPIDS, MICH., Sept. 6, 1877.

"Received of Mrs. Elizabeth K. Gallup, of Mt. Clemens, a draft on New York for three hundred and fifty dollars, it being the balance of eight hundred and fifty dollars for a quitclaim deed to her, bearing date August 24, 1877.

"JAMES GALLUP."

That after the return of Arthur L. Canfield from Grand Rapids, and before the death of Edward C. Gallup, the said Canfield, at Edward's suggestion, prepared, and the said Edward C. and Elizabeth K. Gallup executed and delivered to Martha W. Gallup, a deed of other property in the township of Lenox, then owned by the said Edward C., and consisting of about 50 acres of land; that, after the death of Edward, Elizabeth K. continued to reside upon said property until the time of her death, and Martha W., the daughter, resided with her continuously till some time in 1882, and was with

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her more or less afterwards, until the time of the death of Martha W.; that Elizabeth K. Gallup in her life-time platted said property into lots, and sold and conveyed away several of said lots, and gave away others; that Martha W. was fully cognizant of the platting of said property, and of the sales and conveyances and gifts made by her mother, and during her life-time said Martha W. fully recognized her mother's ownership in said property, and did not claim to own or to have any interest in said property; that, at the time Edward C. sent said Canfield to Grand Rapids, he, the said Edward C., was fully conscious of approaching death, and his mind continued to be clear up to the very last day of his life; that in conversation with one Van Eps, who was an intimate friend, the said Edward C. talked with said Van Eps about his approaching death, told him about the situation of his property, and the transaction between himself and James; whereupon Van Eps suggested the making of a will, but said Edward C. told Van Eps that Canfield had gone or was going to Grand Rapids to arrange the matter with James, and that he (Edward C.) had made arrangements for the distribution of his property, and that a will would not be necessary.

Arthur L. Canfield was sworn for defendants, and complainants contend that, he being a nephew of Elizabeth K., his testimony was inadmissible under the statute. We have deemed it unnecessary to consider the testimony of Arthur L. Canfield, and it is therefore unnecessary to determine the question as to its admissibility. There is no testimony tending to show fraud on the part of Arthur L. Canfield, and none tending to show collusion between said Canfield and Elizabeth K. Gallup. Canfield was sent to Grand Rapids by Edward C. Gallup to adjust the account with James, and to procure a deed of this property from James. He did adjust the matter, and he pro-

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cured the deed in question, and, independently of the testimony of said Canfield, it is shown that he returned to Mt. Clemens, made a report, and exhibited to Edward C. Gallup the deed to Elizabeth, and, in the absence of any showing that he disobeyed instructions, or of collusion with Elizabeth, it must be presumed that he acted in good faith, and in accordance with his instructions. The witness Van Eps testified that he was present at the interview between Edward and Canfield, upon the latter's return from Grand Rapids; that he heard Canfield say that he had procured the papers he went for; that he had the papers there; that Gallup saw them, expressed himself as satisfied, and seemed to be greatly relieved, because he was afraid he was going to die before Canfield's return; that he seemed very anxious for him, and called for him almost every hour. Under these circumstances, it will not be presumed, either that Edward C. Gallup was ignorant of what had been done by his agent, or that his agent acted fraudulently, or in collusion with Elizabeth K. Gallup. In the light of this very deed, and the conveyance to his daughter, it is very clear what Gallup referred to when he told Van Eps that it was unnecessary for him to make a will.

The contention of complainants is that the interest of James in said property was a mortgage interest; that Elizabeth took no greater estate than that held by James; that the debt has been paid by the estate of Edward, and Martha's heirs are entitled to take. Whatever interest James had at the time of the conveyance to Elizabeth, the legal title was in him. By the conveyance to Elizabeth, the legal title was vested in her. Conceding that the deed to James was intended as security for a debt, whatever interest Edward C. had rested in parol. The property had come from his wife's father. He had always recognized her equitable interest therein. Being

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about to die, he was anxious, and manifested a desire, to make a distribution of this and other property, and, by his express direction, this property was conveyed by James to Elizabeth, and the property in Lenox was by himself and wife conveyed to Martha.

The rule is well settled that a right resting in parol may be surrendered or extinguished by parol. In *First Nat'l Bank v. McAllister*, 46 Mich. 397, the husband had taken a deed of certain lands from one Bourn in 1872, and before recording it, at the request of his wife, he surrendered or destroyed this deed, and had Bourn execute another to his wife to secure her for advances which she had made exceeding in amount the purchase price. A few months afterwards the wife made arrangements to purchase the land absolutely, at an advance of $500, and she surrendered to the husband evidences of debt to the full amount. In 1879 a levy was made upon the property, to satisfy a debt of the husband, and a bill was filed against the wife in aid of execution. The Court upheld the title of the wife, and say:

"The canceling of the debt was a complete payment of consideration, and no further ceremony was needed to make the contract a completely executed one, if she already held the title. * * * As between the parties, it is, we think, settled law that one who has deliberately, and without any fraud or deceit practiced on him, but, on the contrary, with the intent for good reasons to have the legal title placed in some one else, obtained a transfer which has all the apparent qualities of such a title, cannot assail it by parol evidence, and show the existence of a former deed to himself, which he has suppressed without recording for the very purpose of having the land reconveyed by his own grantor. The case comes within the rule laid down in *Gugins v. Van Gorder*, 10 Mich. 523. * * * In this case it is complainants, and not defendants, that rely on parol evidence to show a title. Mrs. McAllister holds the legal title of record. The presumptions in her favor cannot be destroyed without proof of an earlier right which is based on superior

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equities, because the first deed recorded is presumptively the best. There would be no equity whatever in allowing a party who has been the procuring agent in giving her this legal priority to destroy it in his own favor, by showing by parol evidence that he once had an unrecorded deed from the same grantor. Complainants show no equity whatever, and are bound by the estoppel against McAllister."

Edward C. Gallup having an equitable right to a reconveyance from James, had an undoubted right to relinquish such equitable interest, and bestow it by way of gift upon Elizabeth; and when the title was conveyed to her at his request, it became a gift as valid as if he had taken a reconveyance from James, and conveyed direct to her, in consideration of love and affection, and in anticipation of approaching death.

This proceeding was instituted by Charles D. Crittenden as next friend of the infant complainants. It appears that, some time prior to the commencement of this suit, the said Charles D. Crittenden procured from Frank E. Crittenden, the father of Thomas C. Crittenden, deceased, a quitclaim deed of any interest which the said Frank E. might have in the property in controversy as heir of Thomas C. Crittenden, deceased. Charles D. has therefore a personal interest in the result which he sought to bring about. He cannot be allowed to litigate his interests at the expense of these minors.

The decree below is affirmed, the bill dismissed, with costs of both courts to defendants, and against Charles D. Crittenden, the next friend.

The other Justices concurred.

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PETER MAHAN v. JOHN CLEE.

Master and servant—Injury to employé—Contributory negligence.

An employé who, with knowledge of the fractious disposition of a horse, drives him within five feet of a moving locomotive, from which steam is escaping, is guilty of such contributory negligence as will defeat a recovery for injuries sustained by reason of the consequent frightening of the horse.

Error to Wayne. (Hosmer, J.) Argued June 3, 1891. Decided July 28, 1891.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

James H. Pound, for appellant.

Dickinson, Thurber & Stevenson, for defendant.

MCGRATH, J. Defendant owns and operates a flouring mill in the city of Detroit. Plaintiff, who is 50 years of age, had been in defendant's employ for nearly 8 years. Plaintiff claims to have been employed to cooper barrels, fill them, and weigh them, and, when not thus engaged, wait on customers. Occasionally he was asked to deliver flour, but he claims to have objected to that kind of work, because not employed therefor. He had, however, during the time that he was in defendant's employ, delivered quite a number of loads of flour, and stated that he objected at least 40 times.

He sets up that defendant had a delivery horse which was balky and fractious; that the horse would start suddenly with a load, and plunge; that at one time while he

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was driving the horse it balked, and at another it became frightened at a hand-cart that was being trundled along the street; that he had several times objected to driving this horse; that defendant had used this horse as a delivery horse for about three years, and plaintiff had driven him a number of times; that on the day of the injury he was told by defendant's son to deliver a load of flour, with this horse and truck, in the eastern part of the city, and then to go to the Michigan Central Railroad freight sheds, and get a load of flour; that he objected, for the reason that he had more work than he could do, and, more than that, "he was not hired to drive teams;" that he was told that it did not make any difference what he was hired to do there,—he had got to do whatever he was told to do; that thereupon he took the load of flour to the eastern part of the city, and went down Woodbridge street on his way to the freight sheds, and when between Eighth and Tenth streets the steam from a passing locomotive frightened the horse, and it began to rear, when plaintiff jumped from the truck, intending to take the horse by the head, but broke one of the smaller bones of his leg in jumping; that the horse did not run away, but one of the by-standers took it by the head. Plaintiff was laid up for some months, and brings this suit for injuries received, loss of time, etc.

It appeared from plaintiff's own testimony that there were a number of railroad tracks in the vicinity of the place of the injury, and that the track upon which the engine, the steam from which frightened the horse, was moving, was a spur track running parallel with Woodbridge street; that this engine was engaged in moving a train of freight-cars, and plaintiff was driving west, and within five feet of the train of cars, while the train was moving east, and when the horse reached the engine the

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escape of steam caused the horse to jump. The court directed a verdict for defendant, and plaintiff appeals.

Irrespective of the question of the liability of the defendant as employer under such circumstances, the plaintiff was guilty of such contributory negligence as will defeat a recovery. He knew the character of the horse, and drove him to within five feet of a moving locomotive, from which steam was escaping. It is a matter of common knowledge that steam from a locomotive will frighten a gentle horse at close range. He says he did not see the engine, but he saw the rest of the train. He must have known that it was being moved by the locomotive, and it was his duty, under the circumstances, to have seen both engine and cars.

The judgment is affirmed, with costs to defendant.

The other Justices concurred.

Francis Reilly v. Mary A. Brown.

Mortgage—Absolute conveyance—Fraud.

The decree of the court below, declaring that the deed sought to be set aside was executed to enable the complainant to secure a loan upon the land, and directing a reconveyance to him subject to the mortgage given to secure said loan, is affirmed.

Appeal from Wayne. (Hosmer, J.) Argued June 4, 1891. Decided July 28, 1891.

Bill to set aside a deed alleged to have been executed to enable complainant to obtain a loan. Defendant

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appeals. Decree affirmed. The facts are stated in the opinion.

Corliss, Andrus & Leete, for complainant.

John H. McDonald (*Frank B. Leland*, of counsel), for defendant.

CHAMPLIN, C. J. The bill of complaint in this case was filed in March, 1890, and alleges:

"1. That complainant owned, for many years prior to June 18, 1889, lots 6 and 7, in block A of the Cass farm, in the city of Detroit.

"2. That complainant, by reason of the appointment of a special guardian over him, whereby his money and property were tied up, was in need of money, and, in order to secure the same, made a deed of said premises to said defendant.

"3. That said deed was made for the sole purpose of securing a loan upon said premises; that no consideration was paid therefor, and it was given under an express agreement with defendant that she would hold the title merely for the purpose of obtaining the loan, and would reconvey the same to complainant at any time he desired.

"4. That defendant and her husband went with complainant, and secured a loan of $3,000, by mortgage to the Michigan Fire & Marine Insurance Company, for which complainant paid defendant $200,—$100 to defendant for personal services, and $100 for her attorney.

"5. That subsequently complainant demanded of defendant a reconveyance of the premises to him, subject to the mortgage, according to agreement; but defendant refused, and fraudulently claimed title, and had taken proceedings to secure possession and remove complainant's tenant.

"6. That defendant was wholly irresponsible, without property, and was endeavoring fraudulently to deprive complainant of said premises by proceedings to secure possession and transfer of title, etc.

"7. Complainant prays that the deed may be declared a mortgage, and that the same may be canceled upon payment of the mortgage by complainant."

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Defendant answered, admitting the transfer and mortgage, but denying the agreement for a reconveyance, and claiming a *bona fide* purchase of the premises.

The defendant insists that much irrelevant testimony was introduced bearing upon the mental capacity of the complainant. We think such testimony was proper and relevant, as bearing upon the relations of the parties, and the true nature of the contract entered into between them. We have read the testimony very carefully, and we must say not without a feeling of indignation at the manner in which this old man has been first cajoled and then swindled out of his money by some of those who have undertaken to befriend him. He commenced life as a common laborer. By his frugality, diligence, and thrift in his youth and maturer manhood, he accumulated a handsome property. He is not able to read or write anything but his name. Because of old age, his intellect has become enfeebled, and he is suspicious of his children, and has become possessed of the idea that some one, in some way, is seeking to get his property away from him, and without cause he has endeavored to secrete it, so that this imaginary or real person cannot find it; and he has conveyed the title first to one person, and then to another, until finally he consummated the transaction with the defendant.

The pretense that she gave value for the property is not sustained by the proofs. She claims that she bargained for it for $3,000, but this money that she claims to have paid was obtained by the mortgage to the insurance company, and we are satisfied from the proofs that the property was worth at least $6,000. When defendant and her husband applied for the loan, they represented the land, without the building, to be worth $6,000, and the building $3,000, and that it rented for $45 a month. This representation was made

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before any deed was executed, and is contained in the application to the insurance company for a loan, dated June 10, 1889, signed "Mary A. Brown, per H. L. Brown." H. L. Brown is the husband of the defendant. It appears from the deed offered in evidence that it bears date the 1st day of May, 1889, but it will be noticed that it is not acknowledged until the 18th day of June, 1889, the same day the mortgage bears date.

We deem it unnecessary to recite at any length whatever the testimony introduced in the cause. From the consideration of the whole testimony, we are entirely satisfied that the decree of the circuit court was correct, and that it ought to be affirmed.

We may further add, from a careful consideration of the testimony, in view of the age and mental condition of the complainant, we are of the opinion that it is needful that a guardian should be appointed to protect him from disposing of his property without adequate consideration, and from consequent want in his old age. The testimony in this case is ample to show that he is incompetent to manage his property.

The decree of the circuit court is affirmed, with costs of both courts.

The other Justices concurred.

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JOHN BASSETT, ADMINISTRATOR OF THE ESTATE OF MARY ANDREWS, DECEASED, v. EDGAR O. DURFEE, JUDGE OF PROBATE.

87 167
92 450

Estates of deceased persons—Will—Election by guardian of widow —Mandamus.

A *mandamus* to compel respondent to enter an order as of the date of filing an election by the guardian of a testator's widow to take under the statute, instead of the will of her deceased husband, she being at the time a mentally incompetent person, setting forth the proceedings had before respondent, and sanctioning, consenting to, and ratifying the filing of said election, is denied, the findings of fact made on the hearing and denial of the petition for said order showing that the election was drawn by the register of respondent's court, and signed and filed by the guardian after consultation with the court, and with its knowledge and consent, but not by its order or direction; which findings are held a sufficient record to show that the election was made and filed with the knowledge and consent of the probate court, and to have the like effect as if made when the election was filed.

Mandamus. Submitted June 20, 1891. Denied July 28, 1891.

Relator applied for *mandamus* to compel respondent to enter an order *nunc pro tunc.* The facts are stated in the opinion.

Conely, Maybury & Lucking, for relator.

Sidney T. Miller (*John H. Bissell,* of counsel), for respondent.

CHAMPLIN, C. J. Stephen Andrews died July 26, 1889, leaving an estate to be administered in the county of Wayne, valued at $17,255.65, of which $13,855.65 was

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personal property. He left him surviving a wife, named Mary Andrews, who had been incompetent mentally and sick for four years before his death. She had been under guardianship on his petition, and so remained until her death, which took place December 11, 1890. They had no children. He left a will providing that she should first be cared for out of her own estate; then, if anything was needed, out of his estate; then all personal property to go to certain relatives of his. Her estate in the hands of her guardian amounted to about $3,200. She was 83 years old at the time the will was made, sick, infirm, and utterly incompetent. Had Stephen Andrews died intestate, she would have been entitled under the statute to about $7,000 of his personal estate, but, a will existing, it was necessary for her to make an election if she desired to take under the statute. How. Stat. §§ 5824, 5825. She was incompetent personally to make the election.

During the life-time of Stephen Andrews he petitioned the probate court for the appointment of a guardian over his wife, Mary Andrews, and upon such petition Lawrence W. Simmons was appointed such guardian. Andrews also named Lawrence W. Simmons as executor of his last will, which was probated September 3, 1889, and he, as such guardian, acting in the matter of the estate of Mary Andrews, did on the 13th day of November, 1889, file an election in the matter of the estate of Stephen Andrews, deceased, as follows:

"STATE OF MICHIGAN, } ss.
County of Wayne. }

"*In the Matter of the Estate of Stephen Andrews, Deceased:*

"To Edgar O. Durfee, judge of probate for said county:

"I, Lawrence W. Simmons, the guardian of Mary Andrews, a mentally incompetent person, and the widow of said deceased, do hereby, in her behalf, waive the

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provisions made for her in and by the last will and testament of said deceased, and elect for her to take her share of the estate of said deceased provided by statute.

"Dated November 13, 1889.

"LAWRENCE W. SIMMONS,
"Guardian for Mary Andrews."

Thereupon the election was filed upon the same day, in the said court, in the matter of the estate of Stephen Andrews, deceased. After the expiration of a year from the probate of the will, it was claimed that this election was of no effect; that the act of election is personal, and can be exercised by no one where the widow is incompetent; and, on an application made by the widow through her guardian to distribute the estate, the court so held, and refused to award any portion to the widow or her representatives. This order of denial was made December 1, 1890. The widow died December 11, 1890. An appeal has been taken from this denial by the widow's representatives to the circuit court. The probate court has made a formal order of distribution, dated January 25, 1891, and from this order the administrator of Mary Andrews has appealed to the circuit court.

In February, 1891, the administrator of Mary Andrews petitioned the probate court for an order to be entered in Stephen Andrews' estate *nunc pro tunc* as of November 13, 1889, confirming and allowing the election which Mary Andrews' guardian had tried to make. A hearing was had upon this petition, and it was denied by the court by the following findings of fact and order made thereon, viz.:

"STATE OF MICHIGAN, } *ss.*
County of Wayne. }

"At a session of the probate court for said county of Wayne, held at the probate office in the city of Detroit on the seventeenth day of March, in the year of our Lord one thousand eight hundred and ninety-one.

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"Present, Edgar O. Durfee, Judge of Probate.

"In the matter of the estate of Mary Andrews, a mentally incompetent person.

"John Bassett, administrator of the estate of said Mary Andrews, now deceased, having petitioned this court for an order ratifying, confirming, and approving the act of Lawrence W. Simmons, guardian of said Mary Andrews, for and in behalf of his said ward, waiving the provision made for her in the last will of her late husband, Stephen Andrews, and electing to take such share of his estate as the statutes of this State provide in cases of such waiver and election; and said petition having been heard and submitted on the 12th of March instant, A. H. Wilkinson and Alfred Lucking appearing for said petitioner, Sidney T. Miller appearing for certain residuary legatees of said Stephen Andrews in opposition thereto, and said Lawrence W. Simmons appearing in person.

"The court finds that on the 13th day of November, 1889, said guardian asked the court what he should do as such guardian in the matter of electing for her to take under said will, or under the statute; that he then made known to the court the value of the estate of said Stephen Andrews, and the age of said widow, and the value of her estate; and that the terms of said will, and the fact that said guardian was also executor of said will, were then considered and discussed by the court and said guardian; that the court advised said guardian that he, as guardian, should act as though not such executor, and should as guardian do as he would were he such widow, and possessed of mental capacity to act in the premises; that, receiving such advice, said guardian declared in open court that he would elect for said ward to take under the statute, and such election was then drawn by the register of this court, and signed by said guardian, and filed; that such election by said guardian, and the drafting thereof by the register, were made with the knowledge and consent of this court, but were not so made by its order and direction. Considering these findings, this court refuses to make the order prayed for, and said petition is hereby denied.

"Edgar O. Durfee, Judge of Probate."

The administrator of Mary Andrews' estate then filed

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a petition in this Court asking for a *mandamus* against Judge Durfee,—

"Commanding and directing him to enter an order in the matter of the estate of Mary Andrews, an incompetent, *nunc pro tunc* as of the 13th of November, 1889, setting forth and reciting substantially the proceedings had before said court on that day, and sanctioning, consenting to, and ratifying the filing of the said election by the said guardian, or such other form of order as the premises will warrant."

We shall not discuss nor decide the merits of the controversy, as to whether the election made by the guardian was valid and effective, at this time, nor shall we direct the judge of probate to enter an order *nunc pro tunc* as prayed for in said petition.

We think the findings made by the probate judge March 17, 1891, upon which he denied the petition (which findings and order are above set forth), is a sufficient record showing that the election filed by the guardian was so made and filed with the knowledge and consent of the probate court, and that it has the same legal effect as if such record had been made at the time such election was filed. Consequently the *mandamus* will be denied, without costs.

The other Justices concurred.

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CHARLES R. MAINS v. HORACE H. WHITING.

Slander—Words actionable per se—Professional character.

1. Spoken words are defamatory without allegation of special damages when the imputation cast by them on the plaintiff is so injurious that the court will presume without proof that his reputation has thereby been impaired; which presumption will arise when the words are spoken of plaintiff in the way of his profession.
2. The words, "You are the dirty sewer through which all the slums of this embezzlement have flowed," addressed to an attorney at law who is at the time conducting the defense of a client charged with such embezzlement, are actionable *per se*, if shown by the plaintiff to have been spoken of and concerning him in the way of his profession or employment.

Error to Calhoun. (Hooker, J.) Argued June 4, 1891. Decided July 28, 1891.

Case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

George H. Southworth, for appellant.

Herbert E. Winsor, for defendant.

[The points of counsel are stated in the opinion, where the authorities are cited.—REPORTER].

CHAMPLIN, C. J. The plaintiff brought suit against the defendant for verbal slander.

The original declaration set out the words declared to be defamatory, as follows: "You are the dirty sewer through which all the slums of this embezzlement have flowed;" and again, "You are the dirty sewer through which all the slums of this embezzlement have been forced;" and again, "If that $20 had been turned over

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to you or to Van Wagner, the company would never have seen 20 cents of it."

It is not necessary to set out in detail the terms of the original declaration, for the reason that defendant demurred, and within the 10 days allowed by rule the plaintiff filed his amended declaration, in which he sets forth that he is an attorney and counselor at law, and solicitor and counselor in chancery, of the State of Michigan, and thereby an officer of all the courts of law and chancery in this State, and is thereby a person holding an office of trust, honor, and profit, and has an office in, and is practicing his said profession in, the county of Calhoun, and setting out in the usual form as to being a good and faithful citizen, etc., and that he was enabled to and did earn and make for himself large sums of money by means thereof, and was enabled to gain and earn a competence and livelihood in and by his said profession, and that he has no other business, occupation, profession, or trade from which to derive an income and gain a competence for himself and family.

He then avers that the Peerless Reaper Company was a corporation duly incorporated under the laws of Ohio, having its home office at the city of Canton, in said state, but was doing business in Michigan, and the defendant was the president thereof at the date of the committing of the grievances in the several counts contained in his declaration. He further avers, by way of inducement, that, at the time last stated, it was well known by his neighbors, and other good and worthy citizens of the State, that he had theretofore been, as such attorney and counselor, etc., employed by the said Peerless Reaper Company, and by virtue of his said employment had represented faithfully and with skill and ability, in divers courts of this State, the said Peerless Reaper Company, and had collected and faithfully and

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promptly turned over to said company large sums of money so collected, and, when called upon for counsel and advice in such employment by said company, had acted and advised honestly and fairly, and as the rules of plaintiff's profession would require,—all of which was well known to defendant.

He avers, further, that $20 had been received by one O. L. Van Wagner, who was then the State agent of said Peerless Reaper Company, for and as the agent of said Peerless Reaper Company, before the 22d day of October, A. D. 1890, and had before that day been by the order of defendant, as president of said company, turned over to one Horace Fairfield by said Van Wagner as traveling expenses, said Fairfield being another agent of said Peerless Reaper Company, and said money being the property of said company, as defendant well knew; and that, to wit, on the 22d day of October, 1890, said Horace Fairfield, for and in behalf of the people of the State of Michigan, by order and direction of the defendant as president of said Peerless Reaper Company, had made complaint in writing on oath before one H. A. Tillotson, then a justice of the peace in and for the city of Marshal, in said county of Calhoun, and a criminal warrant had by said justice been issued on said complaint, charging one Charles H. Van Wagner, as an agent of said Peerless Reaper Company, with having feloniously embezzled and converted to his own use certain chattels, moneys, and effects of said Peerless Reaper Company, and as having feloniously stolen and carried away said chattels, moneys, and effects, contrary to the form of the statute, etc., and thereupon said Charles H. Van Wagner had been brought before said justice of the peace at his office for examination upon such charge, and said plaintiff was by said Charles H. Van Wagner duly employed as the attorney and counselor of the said Van

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Wagner in and about his defense before said justice of the peace upon such charge of embezzlement, and was so engaged in open court before said justice of the peace, and plaintiff was conducting the examination of a witness other than defendant in an orderly and professional manner during the examination of said Van Wagner before said justice of the peace on said criminal charge, and that defendant was not interested in such examination being so prosecuted before said justice save as a witness for and in behalf of the people of the State of Michigan, yet the said defendant committed the grievances hereinafter contained, in open court, before said justice, and in his hearing, and in the presence and hearing of divers good and worthy citizens in said court assembled as spectators and witnesses; he, the defendant, then and at such time knowing that said plaintiff was not a party to nor cognizant of nor in any way a party in interest and guilt to the offense for which said Charles H. Van Wagner was then and there before said justice of the peace charged; and defendant well knowing that said plaintiff, as an attorney or otherwise, was innocent of said charge of embezzlement, or of any embezzlement, of said Charles H. Van Wagner, and that plaintiff was wholly innocent of said embezzlement and charge, and of any guilty knowledge thereof; and also that plaintiff's participation in such proceedings then and there had before said justice was only such as an attorney at law, by virtue of his employment, was in duty bound to do and perform for and in his client's behalf, and such as a client could reasonably expect and require of such attorney at law according to strict honor and integrity, as between such attorney and client; and that such embezzlement with which the said Charles H. Van Wagner was charged was in no way prompted, encouraged, or sanctioned by plaintiff as an attorney and counselor at law or other-

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wise, nor had he any guilty knowledge of it, as defendant well knew.

Nevertheless the said defendant, well knowing the premises, but contriving and maliciously intending to injure, defame, and slander the said plaintiff in his good name, and contriving and maliciously intending to injure, defame, and slander the said plaintiff in his profession as such attorney and counselor at law, etc., as aforesaid, so as aforesaid did falsely and maliciously impute to said plaintiff unfitness to perform the duties of his office and employment as such attorney and counselor at law, etc., as aforesaid, and so did falsely and maliciously impute to said plaintiff a want of integrity in the discharge of the duties of such office and employment as such attorney and counselor at law as aforesaid, and, so intending as aforesaid, did falsely and maliciously speak defamatory words of said plaintiff, which prejudiced said plaintiff in his said profession as an attorney and counselor as aforesaid, and tended to disgrace and prejudice plaintiff before said court so held by said justice of the peace, and to vex, harass, oppress, impoverish, and wholly ruin said plaintiff in his profession, and render him, the said plaintiff, liable to imprisonment in the State prison, and liable to be indicted for an offense punishable by imprisonment in the State prison, under the laws of the State, to wit, on the 5th day of November, A. D. 1890, at the city of Marshal, aforesaid, in open court, before said justice of the peace as aforesaid, in a certain discourse which the said defendant then and there had with the said plaintiff, in the presence and hearing of divers good and worthy persons, did falsely and maliciously speak, publish, and declare to, of, and concerning the plaintiff, as an attorney and counselor at law, etc., as aforesaid, these false, scandalous, malicious, and defamatory words, to wit: "You," said plaintiff meaning, "are the dirty sewer through

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which all the slums of this embezzlement," the said items of embezzlement with which the said Charles H. Van Wagner was charged as aforesaid meaning, "have flowed;" meaning thereby that plaintiff had been guilty of unprofessional conduct in his employment as attorney for the said Charles H. Van Wagner in his defense as aforesaid; and that plaintiff as such attorney for said Charles H. Van Wagner had guilty knowledge of such embezzlement, and had aided, abetted, counseled, consented to, and advised said Charles H. Van Wagner to commit said embezzlement; and that plaintiff as such attorney, with this guilty knowledge of said offense, was shielding said Charles H. Van Wagner, or attempting to shield him, from just punishment; and that plaintiff, in his conduct in the defense of said Charles H. Van Wagner, as aforesaid, as his attorney, lacked integrity, and was wanting in fitness to perform the duties of such office of attorney; and that said Charles H. Van Wagner was simply plaintiff's tool, by which he, the plaintiff, was enabled to embezzle and steal the money charged in said complaint to have been embezzled by said Charles H. Van Wagner, as aforesaid, from said Peerless Reaper Company; and that the guilty intention of embezzling said money mentioned in said complaint originated with plaintiff, and that plaintiff furthered and perfected the details of said embezzlement, and caused it to be completed, and then was as an attorney and counselor at law endeavoring to cover and conceal said crime in his defense of said Charles H. Van Wagner, and as an attorney fraudulently mislead and deceive the court in which said proceedings were had as aforesaid thereby.

Then follows a second count in the declaration, substantially like the one above given, in which the slanderous words are the same, except in place of the words

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"have flowed" the words "have been forced" were substituted.

The third count, referring to the inducement in the first count and making it a part of that, charges the defendant with uttering falsely and maliciously the following, to wit: "If that $20," the $20 turned over to said Fairfield for traveling expenses by order of defendant as president of the Peerless Reaper Company meaning, "had been turned over to you," the said plaintiff as attorney and counselor at law meaning, "or to Van Wagner," the said Charles H. Van Wagner, whose examination on the charge of embezzling the said Peerless Reaper Company's chattels, moneys, and effects was then and there in progress in open court, meaning, "the company," said Peerless Reaper Company meaning, "would never have seen 20 cents of it;" meaning thereby that the said plaintiff, as such attorney and counselor at law as aforesaid, was a person of so little honesty and integrity that if $20 came into his hands, the same being the property of another, the owner thereof would lose said property by the wrongful conversion and embezzlement by said plaintiff; that it would be as safe to intrust money in the hands of Charles H. Van Wagner, who was then and there under arrest for embezzling money as aforesaid, as to intrust it to plaintiff as such attorney; that either plaintiff or said Charles H. Van Wagner, or both, would embezzle the said $20 if it had come into their or either of their possession; that said plaintiff in his profession, and as an individual, was ready and willing to commit crime if opportunity offered, was dishonest, had no integrity, would counsel, connive at, aid, and abet, by his office as an attorney as aforesaid, others to commit criminal offenses; and that plaintiff was a person wholly unfit for and lacked integrity in the discharge of

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his duties as such attorney and counselor at law as aforesaid.

To this declaration the defendant pleaded the general issue, and gave notice thereunder that the alleged statements were without malice, and did not injure the plaintiff in his good name, fame, and credit, etc.; and that the words alleged to have been used by defendant were not understood or interpreted by the hearers thereof then present to mean as set forth in plaintiff's declaration; and that, at the time of the alleged speaking of the alleged slanderous words, the plaintiff was cross-examining the defendant as a witness called in behalf of the people against Charles H. Van Wagner, and that said plaintiff had been shown by the evidence on that examination to be the person who collected the money upon the note belonging to the Peerless Reaper Company, of which defendant is alleged to have been president, and for the embezzlement of which the said Charles H. Van Wagner was then under examination, and that he was at that time the attorney and pretended legal adviser of said Charles H. Van Wagner, and was at the time of such examination, as aforesaid, by counseling said Charles H. Van Wagner, withholding and retaining a large sum of money in his (plaintiff's) possession from the said Peerless Reaper Company, upon the pretext that said company had damaged said Van Wagner by not furnishing him a pretended number of machines during the season for him to sell, and that such sum of money so retained in the hands of plaintiff belonged to the said Peerless Reaper Company, and was in amount, to wit, $1,000; and that such words, language, and statements made by the defendant to said plaintiff were made as a witness in court upon the trial of the cause, and were privileged.

The cause came on for trial on the 12th day of March, 1891, before a jury, and the plaintiff offered himself as a

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witness in his own behalf, and, being sworn, the defendant by his attorney objected to any evidence being admitted under the declaration, or any evidence to prove slanderous words, on the ground that it was irrelevant and immaterial under the pleadings; that the declaration sets out no cause of action, because the words charged in the declaration do not amount to or charge any crime, and are not actionable in themselves, and no special damages are claimed; that the words themselves are simple, and, under any meaning which can be given them, do not convey any criminal intent or criminal action, or anything criminal whatever. The court sustained the objection, and directed a verdict for the defendant. Plaintiff brings the case here by writ of error, and the only question is whether the declaration sets out a cause of action.

It was said by Mr. Justice Clifford in *Pollard v. Lyon*, 91 U. S. 225, that—

"Oral slander, as a cause of action, may be divided into five classes, as follows:

"1. Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude for which the party, if the charge is true, may be indicted and punished.

"2. Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society.

"3. Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment.

"4. Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade.

"5. Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage."

The authorities are uniform that spoken words are defamatory without allegation of special damages when

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the imputation cast by them on the plaintiff is so injurious that the court will presume without proof that his reputation has thereby been impaired, and the court will so presume when the words are spoken of him in the way of his profession. It was said by Ingraham, J., in *Fowles v. Bowen*, 30 N. Y. 24, that—

"Any charge of dishonesty against an individual in connection with his business, whereby his character in such business may be injuriously affected, is actionable. If spoken of him individually, and not in connection with his office or business, these words would not be actionable."

In this case the plaintiff sets up matters of inducement showing the circumstances under which the words were uttered, and expressly avers that they were spoken of and concerning his profession and employment as an attorney and counselor at law. Where such averments are made with respect to the language used by the defendant, it becomes a question of fact to be determined by a jury; and, where the plaintiff avers such fact, it is incumbent upon him to prove the truth of the averment in order to recover in the action. If it be true, as averred, that these words were spoken of and concerning the plaintiff in the way of his profession or employment, then the words are actionable in themselves, and it was unnecessary to aver special damages. The following authorities support this view: *Buck v. Hersey*, 31 Me. 558; *Rush v. Cavenaugh*, 2 Penn. St. 187; *McKee v. Wilson*, 87 N. C. 300; *Sumner v. Utley*, 7 Conn. 257; *Dole v. Van Rensselaer*, 1 Johns. Cas. 330; *Riggs v. Denniston*, 3 Id. 198; *Burtch v. Nickerson*, 18 Johns. 217; *Sewall v. Catlin*, 3 Wend. 291; *Mott v. Comstock*, 7 Cow. 654; *Fowles v. Bowen*, 30 N. Y. 24; *Larrabee v. Tribune Co.*, 36 Minn. 141 (30 N. W. Rep. 462); *Williams v. Smith*, 22 Q. B. Div. 134. We think the plaintiff was

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entitled to introduce evidence to support, if he could, the averments contained in his declaration, and that the court erred in refusing to permit any testimony to be given.

The judgment must be reversed, and a new trial ordered.

The other Justices concurred.

THE PLANK'S TAVERN COMPANY (A CORPORATION) v. JOSEPH H. BURKHARD AND JULIUS F. BURKHARD.

Corporations—Subscription to stock—Revocation.

1. A subscription paper by which the subscribers "promise to pay the trustees of the hotel to be built at St. Joseph [their place of residence] the sums set opposite our names, to be taken as stock, $25 per share," is insufficient in and of itself to form a contract.
2. Two of said subscribers, upon being presented with a more formal paper, refused to sign it, and repudiated their existing subscription, after which a corporation was organized and the hotel erected with full knowledge of the refusal by said subscribers to pay their subscription, which the corporation sought to recover by suit. On the trial it was shown by parol testimony that the hotel was not such an one as was contemplated by the signers of the original subscription paper, and that it failed to meet in many particulars the representations made to the defendants to obtain their subscription. And it is held that the court properly directed a verdict in defendants' favor.

Error to Berrien. (O'Hara, J.) Argued June 4, 1891. Decided July 28, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

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Lawrence C. Fyfe, for appellant.

C. B. Potter (*Potter & Potter*, of counsel), for defendants.

MORSE, J. In the winter of 1888 and 1889 there was talk among the people of the village of St. Joseph about building a large hotel under the auspices of an incorporated hotel company. This agitation was occasioned by the visit of John O. Plank to the village, who represented to its citizens that he would cause the erection in the village of a large summer hotel, with a capacity of entertaining 500 guests or more, said hotel to cost $150,000, in case the people of St. Joseph would subscribe $20,000, to be taken in stock in a corporation to be organized for the construction and operation of such a hotel. An informal meeting of citizens was held, and at such meeting it was thought best by those present to accept Mr. Plank's proposition, and a committee was appointed to solicit subscriptions. Neither of the defendants attended the meeting, and they testify that they had never heard of Mr. Plank at the time they subscribed the following paper, which was presented to them by the committee, and signed, as they claim, with reluctance, and upon the representation that the hotel was to cost $150,000:

"We, the undersigned citizens of St. Joseph, promise to pay the trustees of the hotel to be built at St. Joseph the sums set opposite our names, to be taken as stock, $25 per share."

This was signed by a large number of persons, and by the defendants as copartners, as follows: "Burkhard Bros., $200." Defendants also testified that they were told before signing that this paper was not binding.

"It was merely to see what they could do. They said they would be around with the binding list afterwards."

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It seems that afterwards the committee did go around with a more formal paper, and, as fast as it was signed by those signing the first paper, their names were erased from the first subscription. There was evidence on the part of the plaintiff tending to show that there was no abandonment of this first list, and that the second paper was drawn up for the purpose merely of getting all the subscribers on one paper, as several subscription lists had been circulated in the first place. But there was testimony tending to show that this first paper was informal, and not meant as the final binding subscription, which is also corroborated by the erasures on the first list of the names of those signing the more formal subscription paper. Unfortunately this last paper was not produced, nor was there any clear testimony as to its contents. When this second paper came around, the defendants absolutely refused to sign it, and declined to pay anything towards the building of the hotel. Subsequently to this refusal a corporation was formed called "The Plank's Tavern Company," for the purpose of building a hotel in the said village, with a capital stock stated in the articles of incorporation to be $250,000, and the number of shares to be 10,000, and the shares to be $25 each. The stockholders in such corporation were five in number, as follows:

David Carter, Detroit, 480 shares.
Norman Beckley, Elkhart, Ind., 600 shares.
John O. Plank, Detroit, 8 shares.
John Bell, Benton Harbor, 8 shares.
John Highman, Jr., St. Joseph, 20 shares.

The office of the corporation was located at Detroit, Mich., and the articles of association were acknowledged by the said stockholders between the 22d day of April and the 4th day of May, 1889. September 10, 1889, 8 shares of the stock of this corporation were made out to

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the defendants, and soon thereafter tendered to them. They refused to receive the certificate. This suit was commenced in justice's court upon defendants' subscription, and judgment obtained by plaintiff. On appeal to the circuit court of Berrien county, the judge of that court directed a verdict for the defendants, giving his reasons at some length for so doing.

The hotel was built by this incorporated company, but its whole cost, including furniture and everything else necessary to equip the hotel for business, did not exceed $110,000, if it reached that figure. The directors of the company have mortgaged the hotel to John O. Plank for $60,000.

The theory of the plaintiff is that the hotel was built relying upon the promise of the defendants to pay their subscription, and it is argued that the case is ruled by *Peninsular Railway Co. v. Duncan*, 28 Mich. 130, and the late case of *International Fair & Exposition Ass'n v. Walker*, 83 Mich. 386. But we think there is a material difference between the case before us and either of the cases relied on by plaintiff's counsel. In the case against Duncan, he had signed a preliminary subscription paper, provided for and authorized by statute, as one of the original associates for the formation of a railway company, and signed a subscription agreeing to take a certain number of shares of the capital stock of the proposed company, and to pay therefor—

"At such times and in such sums as the same shall be assessed, demanded, and required to be paid by the directors of said company."

In the majority opinion, at page 138, it is said:

"In the present case it does not become necessary to discuss the question whether a party who expressly revokes his subscription before the corporation is formed can be compelled to pay it afterwards."

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In the same opinion, at page 134, it is also said that the agreement must be mutual, and that there would be no difficulty at common law in enforcing the—

"Promises contained in an agreement of this general nature against the several promisors, where the object to be accomplished was lawful, where a beneficial purpose was in view, and where it was possible to make to the several promisors the return which their subscriptions called for. In such cases the promises are mutual; acts are done and moneys expended in reliance upon the subscriptions; and the moment the promises are accepted by the organization and action of the corporation to which they are provisionally made, there can generally be no difficulty in their enforcement, if the corporation then has it in its power to give the stock subscribed for, and offers to do so."

In the present case the defendants expressly revoked their subscription before the corporation was formed, and nothing could have been done in reliance upon it; nor was there enough of the subscription paper to form a contract in and of itself. It was necessary for the plaintiff, in order to make a case upon it, to supplement and add to its terms by parol evidence. It was not as full and definite as either of the subscriptions in the two cases cited by plaintiff's counsel. Nor did the defendants here, as in Walker's case, attend any meeting of the subscribers, or take any part in forming or organizing the corporation. They did not stand by, as he did, and see the moneys being expended, the ground purchased, and the buildings erected, but, on the contrary, had nothing to do with the matter, and gave neither express nor silent assent. The corporators well knew when the company was organized and the moneys expended that defendants expressly repudiated the whole arrangement.

And there is nothing in the agreement connecting defendants' subscription with the plaintiff corporation. As was well said by the circuit judge, if, at the same

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time that John O. Plank and his four associates were perfecting their organization, five or more of the subscribers to this subscription paper, living at St. Joseph, had, in good faith, executed other articles of association for the purpose of constructing a hotel in that village, it would not have been an easy matter to determine the identical corporation had in mind by the defendants when they signed the subscription paper. The identity had to be found by parol evidence, and, when we go into the realm of oral testimony to fix the liability of these defendants, we find, without serious dispute, that the hotel built by the plaintiff was not such a hotel as was contemplated by the signers to this paper, and that it failed to meet in many particulars the representations made to the defendants to obtain their signatures as copartners.

The circuit judge was right, and the judgment is affirmed, with costs.

The other Justices concurred.

ANSON HOBSON v. GEORGE H. KELLY, PRINCIPAL DEFENDANT, AND CLARENCE M. HILL AND JAMES E. VINCENT, GARNISHEE DEFENDANTS.

Garnishment—Trial of issue—Amount due.

1. A disclosure admitting an indebtedness to the principal defendant of $1,717.28, unless the garnishees had become liable to other parties upon certain orders drawn upon them by the

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principal defendant, aggregating $2,800, is sufficient to enable the plaintiff to demand a trial of the statutory issue thus framed, under How. Stat. § 8068.

2. The question in this case is whether the indebtedness referred to in the disclosure was due at the time of the trial; and it is held that under the evidence a verdict was properly directed against the garnishee defendants.

Error to Saginaw. (Gage, J.) Argued June 12 and 17, 1891. Decided July 28, 1891.

Garnishment proceedings. Garnishee defendants bring error. Affirmed. The facts are stated in the opinion.

Tarsney & Weadock, for appellants.

John M. Brooks, for plaintiff.

GRANT, J. Plaintiff recovered judgment against Kelly for $1,217.40. Upon bringing suit against the principal defendant, plaintiff instituted garnishee proceedings against Hill and Vincent. The circuit judge directed a verdict against the garnishee defendants, who appealed.

The defendants filed a disclosure, stating that at the time said writ was served upon them they were indebted to Kelly in the sum of $1,717.28, unless they had become liable to other parties upon certain orders which Kelly had given upon them, aggregating about $2,800. Defendants had not accepted these orders, and it is conceded that they were not liable upon them. Plaintiff demanded a trial under How. Stat. § 8068. Upon the trial defendants' counsel objected to the disclosure, for the reason that it did not show an indebtedness due at the time it was made, and insisted that it was the duty of the plaintiff to file special interrogatories to elicit more precise infor-

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mation, under sections 8060 and 8061.[1] We cannot concur in this position of the learned counsel. The disclosure was sufficient to entitle plaintiff to demand a trial, under section 8068.

Under our statute, if the indebtedness from defendants to Kelly had not been due at the time of the trial, the circuit judge should have instructed the jury so to find by their verdict. How. Stat. § 8075. This whole question, therefore, is, was such indebtedness actually due? Kelly had constructed a building for defendants, the contract price being $23,000. Defendants were entitled to retain a certain percentage until the completion of the contract. Defendant Vincent testified that the building was completed, except that the work of "cleaning down" was not finished. Kelly had given an order upon defendants for this work to the amount of $150, upon which they had paid $100, and retained $50 to cover the cost of its completion. This work was not finished at the time of the trial, and defendants' counsel, therefore, insist that nothing was due, the total amount unpaid to Kelly being less than the percentage which defendants were entitled by their contract to retain. Kelly, before the disclosure, had presented his bill to the defendants covering the contract price and certain extras. The architect, after striking out certain extras, approved the bill. Defendant Vincent testified that he considered this amount due to Mr. Kelly at the time of the disclosure, and he was willing to pay it, and the only reason he did not was because the orders above mentioned had been presented to him, which covered considerably more than the amount due. He also testified upon the trial that he was willing to pay it then. No necessity exists for giving the testimony in full. Under the evidence, we

[1] Counsel cited *Townsend v. Circuit Judge*, 39 Mich. 407.

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think the instruction of the court correct. It is apparent from the record that this defense is made in the interest of other creditors who subsequently sued Kelly and garnished the defendants.

The judgment is affirmed, with costs.

The other Justices concurred.

ARTHUR D. HUGHES v. CAREY R. DANIELLS AND NATHANIEL I. DANIELLS.

Sale—Passing of title—Payment.

The lessee of a flouring-mill agreed to furnish certain machinery to be used therein during the continuance of the lease, which machinery was not to be removed if the lessors paid the lessee the purchase price. During the life of the lease the lessee mortgaged the machinery, and after its expiration agreed to apply certain indebtedness due the lessors upon the purchase price of the machinery, and to receive the balance in performance of the non-removal condition in the lease. The lessee executed a bill of sale of the machinery to the lessors, in which he stated that it was free from incumbrance, and the vendees tendered him his past-due note given to a third party, upon which they had indorsed the said balance, in payment thereof, which note the lessee refused to accept, and the mortgagee replevied the machinery from the vendees after a demand and refusal. And it is held that the payment or tender of the balance of the purchase price was a condition precedent to the passing of title, and that the tender of the note was not a performance of said condition, nor binding upon the lessee or his mortgagee, and that a verdict was properly directed in favor of the plaintiff.

Error to Clinton. (Daboll, J.) Submitted on briefs June 20, 1891. Decided July 28, 1891.

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Replevin. Defendants bring error. Affirmed. The facts are stated in the opinion.

H. J. Patterson, for appellants.

Spaulding & Walbridge, for plaintiff.

LONG, J. This is an action of replevin, brought in the circuit court for the county of Clinton. The plaintiff replevied the property under the writ, and, on the trial before the court and jury, had verdict by direction of the court. Upon judgment being entered on the verdict, defendants bring the case to this Court by writ of error.

It appears that the defendants on April 1, 1889, were the owners of a flouring-mill situate in that county, and on that day made a lease of the mill to one Quincy A. Hughes for one year next ensuing. By the terms of the lease, the party of the second part was to be at one-half the expense of repairing and keeping in repair the water-power, dam, race, etc., in a sum not to exceed $50, during his term. The party of the second part was to keep the books, which were to be open for the inspection of both parties; and as soon as the profits of the milling business should reach the sum of $300 in the aggregate, or when that amount should be on hand, an account of stock was to be taken, and the account settled between the parties, which was to be as often as once a month, and neither party was at liberty to reduce the stock below $300 without the other's consent. At the end of the term the party of the second part was to yield and surrender up the premises. It was provided that should the rent above reserved, or any part thereof, be behind or unpaid at the time the payment became due, the first party had the right to re-enter. The lease contains the following provision:

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"The party of the second part agrees to furnish two 4-roller mills, either new or in first-class condition for use, to be delivered at said mills for use in same, to be used during continuance of this lease, with right to remove the same, unless parties of the first part pay said party of second part amount paid by him for said machinery, in which event the same are not to be removed."

Quincy A. Hughes took possession of the mill under the lease, and operated it for the full year. After taking possession of the mill, he put in the rollers, as agreed under the lease. On February 26, 1890, Quincy A. Hughes, being indebted to the plaintiff in this case, gave him a chattel mortgage upon these two roller-mills, which were then being used in the flouring-mill, then under his control under the lease. This mortgage was filed in the town-clerk's office on March 3, 1890. It appears that after the expiration of the lease, and on April 12, 1890, Q. A. Hughes executed a bill of sale to the defendants of the two roller-mills as follows:

"WACOUSTA, April 12, 1890.

"This is to state that I have this day sold Daniells & Co. two frame roller-mills, now in their mill, and they are free and clear of all incumbrance."

Quincy A. Hughes was called as a witness, and testified, in relation to the sale of the mills to the defendants, that they were to pay in cash for the same; that the defendants asked him if the mills were free and clear, and he told them that they were not; that he still owed Hutchinson on them, and lacked money to pay for and discharge the chattel mortgage, and that he wrote the plaintiff, his brother, that he would pay him the chattel mortgage as soon as Daniells paid for the mills; that at this time the defendants had a claim against him of $118, and they were to pay him the difference between that amount and the cost of the roller-mills; that on the

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same day after he made out the bill of sale to the defendants, instead of paying him the difference in money, they tendered him the following note:

"GRAND LEDGE, Mich., July 20, 1888.

"On or before one year after date, I promise to pay to Geo. M. Berry or bearer four hundred and twenty dollars, value received, with interest at the rate of ten per cent., payable at Loan and Deposit Bank.

"Q. A. HUGHES."

Indorsed on back as follows:

"April 12, 1891. Paid on the within note two hundred eighty-seven dollars."

That this was the first that witness knew that defendants held that note.

The defendants gave evidence tending to show that they arranged with Q. A. Hughes for the purchase of the mills some two weeks before the 12th day of April; that there was $118 due them from Mr. Hughes, and they tendered him the note above set forth for the balance; that they asked Hughes if he had the discharge of the mortgage he gave to his brother, and he said he had, but had left it up at the house; that he said he would go and get it; that this was about 9 or 10 o'clock in the morning, and in the afternoon of the same day he came back, and said he was ready to close up the matter, but they then forgot to ask him for the discharge of the mortgage; that they then took the note, and told him he could indorse the balance, $287, on the note, when he said: "You can't come that game on us." They then told him they would indorse the balance on the note, which they did, and tendered him the note. He refused to take it, and went away. The defendants testified that the rolls were worth at that time $405.

The plaintiff testified in his own behalf that the con-

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sideration for the chattel mortgage was his signing a $160 note for his brother to buy these mills; that he signed another note of $100 for him, and loaned him $60 or $70; that, his brother being unable to pay the notes, he paid them, and took them up, and had not been repaid; that he made a demand upon the defendants for these roller-mills under the mortgage, and they refused to surrender them. The mortgage given to plaintiff recited a consideration of $600, but all the plaintiff claimed as due thereunder was the amount of these two notes and the $60 or $70 loaned.

The assignments of error are:

First. That the circuit judge erred in permitting the defendant Carey R. Daniells to be questioned as to what he paid for the note which he tendered Q. A. Hughes, and the arrangement under which he procured it.

Second. That the circuit judge erred in refusing to give defendants' requests to charge.

Third. That the circuit judge erred in taking the case from the jury, and directing a verdict for the plaintiff.

These requests to charge are as follows:

"1. The contract between Quincy Hughes and Daniells provides, among other things, that he, Quincy Hughes, furnish two roller-mills, either new or in first-class condition, to be delivered at said mill for use in the same, to be used during the continuance of this lease, with right to remove the same, unless parties of the first part pay said party of the second part the amount paid by him for said machinery, in which event the same are not to be removed; and I charge you that, if Daniells did settle and pay him, Hughes, as agreed in the lease, the mortgage given to plaintiff would be void as to the rolls.

"2. If you find from the evidence that Daniells and Quincy Hughes did have a settlement as claimed on the 12th day of April, and they then figured up, and Quincy Hughes turned over possession to Daniells of the rolls in

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question, and at the same time gave him a bill of sale, as he did in this case, and accepted the sum of $118 in payment therefor, then that would be a transfer of title to the rolls to Daniells, and the plaintiff cannot recover.

"3. It is claimed by Quincy Hughes that the obtaining of the bill of sale on the 12th day of April, and the acceptance of the $118 to apply on the same, and the relinquishing of the possession of the rolls to Daniells, was with the understanding that cash, and nothing else, should be received in payment for the balance. Then I charge you that, before the plaintiff can recover in this cause, he must show that he, Quincy Hughes, disaffirmed Daniells' understanding of the settlement by returning, or, in other words, paying back, to Daniells the $118 he had received on the rolls.

"4. It is a well-settled principle of law that wherever a party enters into a bargain or agreement to do a thing or receive an article, and at the same time receives part payment therefor, if he wishes to be released from the terms of the agreement by reason of misunderstanding, fraud, or otherwise, before he can do so he must restore to the other party what he has received, because, if he retains the same, it would be a confirmance of the understanding; so, in this case, if you find that Quincy Hughes settled with Daniells, and in the settlement received part payment on the rolls, and delivered to Daniells actual or constructive possession of the same, then I charge you that the plaintiff cannot recover in this suit."

The argument of counsel for defendants upon his third assignment is that, if the conversation between Quincy Hughes and the defendants was to the effect that the defendants were to keep the roller-mills and settle for them, and no particular time was set to close up the settlement, and this understanding was followed up by the bill of sale, together with possession delivered to defendants of the mills, this would constitute a sale to defendants, or, at least, it became a question for the determination of the jury; that it was the duty of Quincy A. Hughes, under the terms of the lease, to pay defendants the $118 he owed them, as this indebtedness arose by Quincy A. Hughes keeping and holding in his possession

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this amount, which were profits of the mill belonging to the defendants, and that the non-payment of this amount due the defendants was a violation of the lease, and rendered it void, as to any promise made by Daniells to pay for the mills to prevent Hughes from removing them under the terms of the lease, and that Hughes was absolutely barred from any rights whatever under the lease to enforce it, and could only put himself in condition to claim anything by reason of the lease by paying to the defendants this sum; that not having done this, and not having offered to pay this sum, the defendants had the right to retain the rolls.

We cannot agree with the counsel in this contention. Defendants had the right, by the terms of the lease, to pay for the roller-mills, and keep them; and had payment been made, or tender of payment been made, to Q. A. Hughes, under the circumstances, the mortgagee would have had no right to remove them. It is admitted that the defendants did not pay, nor tender payment, for the roller-mills in such a manner that Q. A. Hughes was bound to accept it. It is apparent that at the time the bill of sale was made Hughes expected that the balance, over and above the amount he owed to the defendants, would be paid to him in cash, and he could not be compelled to deliver them until payment was so made or tendered. The title would not pass to the defendants until such payment or tender was made. The tender made by defendants of the past-due paper of Hughes was not a tender of payment, within the terms of the contract of sale, as explained by the defendants themselves. One of the defendants testifies that he said nothing to Hughes about paying for the mills in that way, or that he held the note, until after the bill of sale was made. Such a tender as defendants claim to have made would not be binding upon Q. A. Hughes or his mort-

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gagee. *Hale v. Holmes*, 8 Mich. 37; *Williams v. Jackson*, 31 Id. 485; *Allen v. Hartfield*, 76 Ill. 358; *Bush v. Bender*, 113 Penn. St. 94 (4 Atl. Rep. 213). There was consequently no payment or tender of payment by the defendants for these rolls.

It appears that, when the agreement was made between these parties that the $118 owing by Hughes to the defendants should be applied as a part of the purchase money, it was expected that the balance would be paid in cash, and therefore, the defendants having failed to pay the balance in cash, Q. A. Hughes could not be held to the repayment of the $118 before his mortgagee could have the right to claim the roller-mills under his mortgage. There was no question upon the trial in the court below but that the mortgage was given for a valid consideration, and taken by the plaintiff in good faith, to secure him for the indorsement of these notes and the moneys advanced. One of these notes for $160, was for the money used by Hughes in the purchase of these identical mills.

Some claim is made in this Court that, the mortgage being given for a larger amount than the real consideration, the question should have been submitted to the jury as to the *bona fides* of the mortgage. We cannot find that that question was raised in the court below, and, if it was, we see nothing in the record which should charge the plaintiff with bad faith in the taking of this mortgage. We think the court very properly refused defendants' requests to charge, and directed the jury to return a verdict in favor of the plaintiff. In this view we need not discuss the other questions raised.

The judgment must be affirmed, with costs.

The other Justices concurred.

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DANIEL MCDONNELL AND JAMES H. TAYLOR v. ROYAL J. FORD.

Evidence—Custom—Partnership—Charge to jury.

1. Evidence of a custom among contractors and builders to charge, for each man working on a job taken by the day, an advance over the price paid him by the contractor, is held admissible in this case, it appearing that the men were general employés of the contractors, and that their labor was worth the price charged therefor.
2. In a suit by a firm composed of two members to recover a balance due on a building contract, it appeared that the defendant contracted entirely with one partner, but that all of the bills were rendered to him in the firm name. And it is held that a request for an instruction that, before the plaintiffs could recover, the jury must be satisfied that the defendant contracted with the *firm*, was properly refused.
3. In a suit upon a building contract the plaintiffs claimed that they were to furnish and pay the men, who were to work by the day, and they added 25 to 50 cents per day for each man's work above the *per diem* actually paid them. The defendant contested plaintiffs' extra charge, and also claimed to recover pay for carrying the men to and from their work. And it is held that the jury was properly instructed that, if they deducted plaintiffs' extra charge from their bill, they should also reject that of the defendant.
4. Where the uncontradicted testimony shows the payment by the plaintiffs of a certain sum of money for the benefit of the defendant at his request, it is not error for the court to state such fact to the jury.

Error to Wayne. (Brevoort, J.) Argued June 20, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

James H. Pound, for appellant.

James H. McDonald, for plaintiffs.

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LONG, J. This is an action of *assumpsit* brought in the Wayne circuit court. Upon the trial before the court and jury, plaintiffs had verdict and judgment for $225. Defendant brings error.

The plaintiffs sued for a balance of account due them for labor and materials furnished defendant in building a house. Their claim was that they first prepared two plans for the house. The first plan drawn was not used, but was paid for by the defendant, less $5. The house was built in accordance with the second plan. The plaintiffs' claim upon the trial was that, after the second plans were drawn, the defendant let the contract for the mason-work to Putnam & Clark; that, after this contract was let, defendant turned to plaintiff McDonnell, with whom the whole arrangement had been made, and said:

"You can do the carpenter work by days' work, and then, if I want to make any changes, I can make them without any figuring or alterations of the contract, and if I want to leave any part of the house unfinished, I can do so."

That under this arrangement plaintiffs were to furnish the men by the day; that plaintiffs were contractors, which defendant well knew, having a large number of men under their control and in their employ, who were immediately set to work upon defendant's house; that during the erection of the house they furnished to defendant materials which they had in stock at their own shop, and also purchased and paid for lumber and other materials at other shops; that defendant made payments from time to time, so that when the house was built he was indebted to them nearly $500, $200 of which was paid by the defendant in the December following. The plaintiffs, in making their bill against the defendant, charged therein from 25 cents to 50 cents per day,

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upon each man employed upon the work, more than these contractors actually paid to the men. The controversy in this case grows largely out of this charge, though some contention is made over a bill of materials purchased and paid for by the plaintiffs at the mill of Baker & Shefferly.

The plaintiffs, to prove their case, gave testimony upon the trial tending to show that they were contractors, and that it was the custom of contractors and builders where jobs were taken by the day to charge, for each man engaged, something more than the contractor and builder paid to the men; that the services of the men were worth all that was paid for them; and that they actually procured the materials used in the building at the defendant's request, and paid the men, which was charged to the defendant.

The defendant's claim was that, when the arrangement was made by which the plaintiffs were to do the work by the day, it was made solely with Daniel McDonnell, and he knew nothing of his having a partner, and that Taylor had no concern in it; that he proposed to McDonnell to pay the men himself that he had sent there to work, to which McDonnell demurred, and said he could get better work out of the men by paying them himself, and that defendant said that it was immaterial which way they did, so long as the men got their pay.

There was no dispute upon the trial but that the work was satisfactorily done, and no contention but that McDonnell paid for the material that he charged up to the defendant; though defendant contended he should have a bill of particulars of the items procurred from Baker & Shefferly, which was never furnished him. Mr. McDonnell explains this by saying that he presented the bill for material which he wanted to Baker & Shefferly, got their prices, and then made a contract with them at

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the lowest price by taking the whole quantity at a job lot; that he left the bill with Baker & Shefferly, and could not produce it to the defendant, but offered to take the defendant to their shop, and have the matter explained by them, and defendant refused to go.

Defendant upon the trial claimed some set-offs, which were referred to by the court in its general charge to the jury.

The court in its charge to the jury directed them, if they found under the evidence that there was no agreement as to the price at which the labor was to be supplied, the plaintiffs would be entitled to charge such additional sum for their profit on the men as is customary and reasonable; but that if they believed the defendant's theory, that he spoke to McDonnell about paying the men himself, and McDonnell said that he could get more work out of the men by paying them himself, or gave the defendant to understand that he would not charge him therefor, then he could not recover for that.

The assignments of error relate to the rulings of the court in admitting certain evidence upon the trial, the refusal of the court to charge as requested by the defendant, the giving of the plaintiffs' requests to charge, and in charging the jury that the Baker & Shefferly bill had been paid by the plaintiffs.

The first contention in brief of defendant's counsel is that the court was in error in permitting the counsel for the plaintiffs to ask the following question:

"Do you know whether there was any denial of this paper in justice's court by Mr. Ford?"

The paper referred to was the statement of the names of the men who had worked upon defendant's house, and the time each man was employed there. It was a time-bill. It appears that the plaintiff McDonnell did not

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keep this bill himself, as he was not present during the whole time the men were employed there. He put his father in charge of the work, who kept the time, and reported it to the plaintiff McDonnell each Saturday night. It appeared upon the trial that McDonnell's father died before the trial of the case. The action was commenced in justice's court, and appealed to the circuit. This time-bill was put in evidence before the justice's court, and it appears no objection was made to it there. Whether this was true or not, there was no error, under the circumstances, in the court allowing the paper to be put in evidence on the trial in the circuit court. The defendant introduced no evidence, and offered none, showing, or tending to show, that this time-bill was not correctly kept, and the plaintiffs' right of recovery for the extra charge for each man depended upon the length of time or number of days each man was employed; and the plaintiffs had the right to show the number of days, and McDonnell testified that the time-bill was made up each Saturday during the work upon the defendant's house.

The next contention is over the Baker & Shefferly bill. The court permitted this to be put in evidence under defendant's objection. There was no error in this. It represented the exact amount paid by Mr. McDonnell for the defendant, at his request.

The court was not in error in permitting plaintiffs, as a part of their case, to show the custom of contractors and builders in making these extra charges where the contract is by the day.

It appears that, at the close of the testimony, the defendant requested the court to charge the jury that they must believe the defendant contracted with McDonnell & Taylor before plaintiffs could recover. This request the court refused to give. There was no error in this. McDonnell testified that Taylor was his partner

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in business, and was sharing with him in this contract. It may be that the defendant did not know that Taylor was a partner with McDonnell, but it appears that, in all bills rendered by the plaintiffs to the defendant, they were rendered in the name of McDonnell & Co.

The defendant, in his bill of items of set-offs, claims pay for carrying the men at work upon his house to and from work. This bill amounts to $107.25. Counsel for defendant contends that he was entitled to the charge that this set-off should be allowed; that it was not merely a matter of set-off, but of payment upon the contract. The court charged the jury that should they deduct this 25 or 50 cents a day on the defendant's work from the plaintiffs' bill, then they should also deduct the amount of defendant's claim for carrying the men. The court was correct in this ruling. If the defendant was to pay the men, and the plaintiffs had no right to recover for this extra charge, then the defendant would have no right to have deducted from plaintiffs' bill the amount charged for carrying the men to and from their work.

The court was not in error in stating to the jury that the Baker & Shefferly bill had been paid by the plaintiffs. The testimony showed, without contradiction, that this bill had been paid by the plaintiffs, and that it was for material purchased by the plaintiffs for the defendant, and at his request.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

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ADAM SPONABLE, AN INCOMPETENT PERSON, BY WASHINGTON SPONABLE, HIS GUARDIAN, v. LECTA HANSON AND BELLE COOK.

Deed—Mental incompetency—Evidence—Bona fide mortgagee.

1. Where, soon after the commencement of proceedings in probate court for the appointment of a guardian for an aged father as an incompetent person, he executed a deed of his home farm to a daughter in consideration of her agreement for his support, and a few weeks afterwards he was adjudged to be mentally incompetent by the judge of probate after a personal examination in said proceeding, and a guardian was appointed, who filed a bill to set aside the deed, in which suit the father was examined as a witness, and adjudged mentally incompetent by the circuit judge, the appellate court will require a strong showing before setting aside the findings of the two lower courts.
2. A decree setting aside a deed on the ground of the mental incompetency of the grantor to make it is sustained upon the testimony of the leading expert witness for the grantee that, when he privately examined the grantor, he did not know whether he had made a deed, a will, or a lease, and upon the opinion of the witness that the grantor was not competent to make a sale of his land for money, and protect his interest in it.
3. A mortgagee of the grantee of an incompetent person, whose brother acted as her agent in making the loan secured by the mortgage, and who drafted the deed to the mortgagor, and was present at its execution, cannot be regarded as a *bona fide* mortgagee without notice, but the lien of the mortgage will be sustained to the extent of the money received by the incompetent person from the mortgagor on account of the mortgage.

Appeal from Barry. (Hooker, J., Argued July 2, 1891. Decided July 28, 1891.

Bill to set aside a deed because of the mental incom-

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petency of the grantor. Defendants appeal. Decree affirmed. The facts are stated in the opinion.

Stuart & Knappen and *C. G. Holbrook,* for complainant.

Smith & Colgrove, for defendants.

GRANT, J. The bill in this case was filed to set aside a deed made by Adam Sponable to the defendant Lecta Hanson. It is alleged that the deed was obtained by undue influence practiced upon Adam Sponable by Lecta Hanson and her husband, and that Adam was mentally incompetent to execute the deed. Decree was rendered in favor of complainant, and defendants appeal.

The deed was executed March 20, 1889. Adam was then about 75 years old. His wife died on the 13th of the same month. Proceedings had been instituted in the probate court for the appointment of a guardian over complainant, upon the ground of his incompetency to manage, control, and dispose of his property. These proceedings were commenced just prior to the making of the deed, and the citation had been served upon the complainant.

The land conveyed consisted of 55 acres, which was complainant's homestead, and 30 acres of lowland, used mainly as a pasture, and was worth between $3,500 and $4,000. Camplainant had three sons and three daughters, of whom Lecta was one. Lecta lived with her father and mother most of the time till she was 37 years old, when she married. After her marriage, in 1874, she and her husband removed to Ohio, where they lived 3 years. They then returned and worked her father's farm on shares for 10 months. They left on account of some trouble, and in 1880 they again returned, and worked the farm upon shares for a year. They left again on account

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of trouble, but returned in the fall of 1886, and again took the farm on shares, continuing to work it in that manner until this deed was made. The farm was productive, and yielded sufficient to cover all the household expenses. Complainant and his wife lived with the Hansons, the Hansons receiving two-thirds of the crops and complainant one-third. Mrs. Hanson testifies that her father paid the taxes, clothed himself and his wife, paid the physician's bills and the expenses of his wife's funeral, and paid one-half the expense of living the first winter. After that they divided the entire products, first using, however, from the joint property what was necessary for the table. Upon the execution of the deed, Mrs. Hanson loaned $200 from the defendant Cook, and gave her a mortgage upon the land to secure it. Of this money $100 was paid to Adam, and Mrs. Hanson's husband used the balance for his own private purposes. Not long before this time complainant owned considerable personal property, which he had sold and converted into money. It appeared that complainant had disposed of all this money except $10.

It will thus be seen that the relations which had existed between complainant and Mr. and Mrs. Hanson were based entirely upon contract. The record discloses no prejudice on the part of complainant against his other children. It does not appear that Mr. and Mrs. Hanson had rendered unrecompensed services to complainant, which would afford a reason for his deeding the greater part of his property to Mrs. Hanson. It is true that the deed provided that they should take care of him in the future. It was entirely competent for him thus to provide for his care, provided that he did it of his own free will, and was competent to understand the nature of the transaction. This transaction was

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regarded by the defendant Hanson and her husband in the nature of a contract, for she testified that she gave the mortgage to bind the bargain, and pay for the 30 acres, which 30 acres were worth from $400 to $600.

The court below did not pass, evidently, upon the question of undue influence. Undoubtedly the proper finding on this point in the case would be "not proven," though Mr. Hanson appears as the moving party whenever complainant proposed a deed of his property.

The circumstances surrounding the transaction are not such as to commend the conduct of Mr. and Mrs. Hanson to a court of equity. Her father was failing both physically and mentally. He was depressed by the loss of his wife, upon whose judgment and advice he had greatly relied during a married life of nearly 50 years. Common fairness would have dictated a consultation with her brothers and sisters. The undue haste with which Mr. and Mrs. Hanson at least permitted the transaction to be recorded is not commendable. Mr. Hanson went with complainant the previous fall to an attorney, who drew a deed similar to the one in controversy. Complainant's wife condemned the transaction, and refused to sign the deed, and nothing came of it. The attorney who drew the deed then notified the other children of this deed.

The result of the case must, however, be determined by the competency or incompetency of the complainant to make the deed. Forty-one witnesses were sworn, chiefly upon this point. Among them were several physicians, some of whom testified that they considered him competent to make the deed; others to the contrary. After a personal examination by the judge of probate, within a few weeks after the deed was made, the judge pronounced

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him incompetent. He was also produced as a witness in the circuit court upon this hearing, and the learned circuit judge came to the same conclusion. One who has made a personal examination in such cases is certainly more competent to judge than those who have not, and who besides have not seen any of the witnesses. It must certainly be a strong showing which would warrant us in setting aside the finding of two courts in such a matter.

But upon the testimony of Dr. Pratt, the leading expert witness for the defendants, we find sufficient to sustain the decree. Dr. Pratt says, upon cross-examination, that he did not think complainant competent to make a sale of his land for money, and protect his interest in it. If he was not, then he was not competent to make the deed in question. Dr. Pratt further testified that, when he examined him privately, he did not know whether he had made to Mrs. Hanson a deed, a will, or a lease. The complainant, when upon the stand, testified that he supposed Mr. and Mrs. Hanson were still working the farm upon shares.

It would be unprofitable to discuss further the facts to be elicited from a record of 727 pages. The finding of the court that complainant was of unsound mind, and mentally incompetent to execute the deed, is correct.

It only remains to determine the rights of Mrs. Cook upon her mortgage. The court below sustained the mortgage as to $100, because complainant had received the money. True, Mrs. Cook had no actual knowledge of the condition of complainant, but the money was loaned through her brother, who drew the deed, was present at its execution, and was her agent in the transaction. We think, under this record, that Mrs. Cook cannot be regarded as a *bona fide* mortgagee without notice, and that her mortgage lien cannot be sustained,

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except to the extent of the money received by complainant.

The decree is affirmed, with costs to complainant against defendant Hanson.

The other Justices concurred.

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JAY A. HUBBELL v. GRAHAM F. BLANDY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF GRAHAM BLANDY, DECEASED.

Bailment—Liabilty of bailee—Conversion—Measure of damages—Error without prejudice—Revival of suit by executor.

1. A stock-broker who receives a certificate of stock from the owner for safe-keeping, which he fails to deliver on demand, having delivered it to the officers of the corporation without the consent of the owner, who have canceled it, is guilty of its conversion, regardless of his intention in the premises.
2. The court instructed the jury that the measure of damages would be the value of the stock when the owner received notice of its conversion, with interest, and all dividends paid on the stock from the time of its delivery to the broker up to the date of said notice, with interest from the dates when they were payable, which instruction was excepted to by the defendant, who contended that plaintiff could only recover the highest price reached by the stock within a reasonable time after plaintiff learned of its conversion, and within which he could go into the market and repurchase it. And it is held that, as the application of the latter rule would not decrease the judgment under the established facts, no error is seen in the case, and the judgment is affirmed.
3. Where a non-resident defendant dies after the entry of judgment, and the suit is revived in the name of an executor, who is appointed on the probate of defendant's will in this State, and removes the judgment by writ of error to this Court for

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review, an objection that the executor has no standing in Court, it not appearing that the testator had any property in this State, is untenable, the question being ruled by *In re McCarty*, 81 Mich. 460.

Error to Houghton. (Steere, J.) Argued July 2, 1891. Decided July 28, 1891.

Trover. Defendant brings error. Affirmed. The facts are stated in the opinion.

Stone & Gray, for appellant.

T. L. Chadbourne, for plaintiff.

LONG, J. This is an action of trover for the unlawful conversion by the defendant, Graham Blandy, of 1,000 shares of the capital stock of the Colorado Central Consolidated Mining Company, a corporation organized and existing under the laws of the state of New York.

The defendant was a stock-broker doing business in the city of New York. The plaintiff is a citizen of Michigan, and had had business dealings with the defendant prior to 1882. It is conceded that in the fall of 1882 the plaintiff placed the certificate of stock in question in charge of the defendant for safe-keeping. In the fall of 1886 the plaintiff asked the defendant for a list of his stocks then in the possession of defendant. The defendant sent plaintiff a list of the stocks in his hands, and included the stock in question. On the next day the defendant discovered that he did not have this stock, but that it had been delivered to the officers of the company in the fall of 1884.[1] On the trial it was a disputed question whether the stock had been so delivered by the defendant upon an order of the plaintiff

[1] The certificate was canceled by the corporation, and a new one issued to another party.

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or not, the defendant and his clerk testifying that the stock had been so delivered upon the plaintiff's written order, while the plaintiff testified that he had never given such an order, and, if the stock had been so delivered, the order was a forgery. The defendant testified that he took the stock at plaintiff's request, and for his accommodation only.

It was contended by defendant's counsel on the trial that, if defendant was a bailee without reward, he was not responsible for the loss of the stock intrusted to him, unless he was guilty of gross negligence, and that this gross negligence must be equivalent to fraud in order to make him liable in an action; and that a promise by a bailee, without reward, to keep safely, does not render him liable for injury or losses occasioned by the acts of wrong-doers. The circuit judge refused to submit that question to the jury, but submitted to the jury one question only, and that was,—

"Did or did not the plaintiff authorize Mr. Blandy to deliver the stock in question to the officials of the mining company, where Mr. Blandy testified that he did deliver it?"

The jury, having found against the defendant upon this question, returned a verdict in favor of plaintiff for $4,426.25. Judgment upon this verdict being entered, defendant's executor brings error.

It appears in the case that the defendant died in the city of Brooklyn, N. Y., four days after the entry of this judgment, leaving a last will and testament. His will having been admitted to probate in this State on March 24, 1891, and letters testamentary having been issued to his executor, Graham F. Blandy, the death of the defendant was suggested of record, and the cause was revived in the name of such executor. The writ of error was sued out by the executor. Plaintiff contends

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that the executor has no standing in this Court, as it does not appear that Graham Blandy left any property within this State to be administered. This point is not well taken. We think this question was ruled by *In re McCarty*, 81 Mich. 460, and *In re Nugent's Estate*, 77 Id. 500.

But two questions are raised by this record upon the part of the defendant, and under which his counsel contend the case should be reversed, namely:

1. Did the court err in not submitting to the jury the question whether or not the defendant was a gratuitous bailee, and, if so, as to the extent of his liability and degree of care required as such?
2. Did the court err in his instruction to the jury as to the proper measure or rule of damages?

It is contended by defendant's counsel upon the first proposition that, Graham Blandy having testified that he received and held the stock solely for the accommodation of the plaintiff, the burden of proof was upon the plaintiff to show that the loss was owing to the bailee's negligence; that, in order to recover, it devolved upon the plaintiff, not only to show a deposit of the stock with defendant, and that defendant did not restore it, but, further, to show that the non-restoration was produced by the lack of due diligence on the part of defendant; and that the evidence in the case did not warrant a recovery by the plaintiff. The proposition of defendant's counsel is that the defendant was a mere gratuitous bailee, and not responsible for losses occasioned by the acts of wrong-doers, and not even for a theft not caused by his own neglect. Counsel cite numerous authorities upon this proposition.[1]

[1] Counsel cited *Scott v. Bank*, 72 Penn. St. 471; *Comp v. Bank*, 94 Id. 409; *Whitney v. Lee*, 8 Metc. 91; *Davis v. Gray*, 141 Mass. 531; *Jones v. Morgan*, 90 N. Y. 4; *Green v. Birchard*, 27 Ind. 483; *Schermer v. Neurath*, 54 Md. 491; *Dougherty v. Posegate*, 8 Iowa, 88; 2 Amer. & Eng. Cyc. Law, 52.

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This is an action of trover for the conversion of the property by the bailee. The conversion shown was a transfer and delivery over by Graham Blandy of these shares of stock to the company issuing them, without the consent or authority of the plaintiff. It appears that, at the time the stock was delivered over to the company, it was of great value, and the plaintiff, by reason of its wrongful delivery to the company, was put in a position where he was unable to recover the stock, and upon the part of Graham Blandy it amounted to a conversion. Demand was made upon him for it, and he wholly failed to replace it. It was held in *Dearbourn v. Bank*, 58 Me. 273, where the bank was intrusted with bonds for safe-keeping, which, when called for, were found to be gone, and the evidence tended to show that they had been lost, stolen, or misdelivered, that trover would not lie, since it could only be by a misdelivery that the bank, under the circumstances, could be held liable, and the misdelivery was not established. In the present case we think the court very properly left the only question to the jury which could arise; that is, "Did Mr. Hubbell authorize the delivery?" The finding of the jury that Mr. Blandy delivered the stock without Mr. Hubbell's assent amounts to a finding in fact that he was guilty of the conversion charged.

The cases cited by defendant's counsel, we think, have no application to the present case, under the finding of the jury that Mr. Blandy converted the property, as it would make no difference whether the conversion was to his own use or to the use of another, inasmuch as the plaintiff was thereby deprived of the property. In such cases the bailee is liable for the value of the property converted, and it makes no difference how good his intentions are, or how careful he may have been in the premises. In *Hawkins v. Hoffman*, 6 Hill, 586, it was said

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that trover may be maintained against a common carrier where the goods intrusted to him are lost by his act, though without any wrongful intent; as where he delivers them to the wrong person by mistake, or under a forged order. It is said by Mr. Justice COOLEY in his work on Torts, page 632, that—

"Liability as gratuitous bailee only arises when the trust has once been assumed, * * * but any dealing with the subject of the bailment in a manner not warranted by the understanding is, in law, wrongful. Therefore, if one having undertaken to carry and deliver money for another shall hand it over to a third person to be carried, from whom it is stolen, or by whom it is lost, the loss must fall upon the bailee, who alone was trusted by the owner."

Defendant's counsel also cite in support of their proposition *Beller v. Schultz*, 44 Mich. 529. In that case it appeared that Schultz went to work for Beller, and took two flags with him, a large one and a small one. He lent the large one to Beller, and helped to put it upon Beller's building. He went away without taking the small one, and permitted the other to remain flying where he had assisted in placing it. Subsequently a hail-storm injured it. He sent for both flags, and received the small one, but failed to receive the other. He sued in *assumpsit* for its value. It was held by this Court that there was no cause of action. It was said in that case that the bailment was not shown to have been abused; that there was no proof that Beller failed in his duty.

"If there was any want of such care to guard the flag against injury from storms as the law would consider due, which is not probable, it was for Schultz to give evidence to prove it. He gave none whatever, and it is not to be presumed that Beller was in fault."

In the present case it appears that the property was actually converted, either to the defendant's use or the

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use of the company, and that without the consent of the plaintiff.

The second question raised relates to the charge of the court upon the measure of damages, as follows:

"In case you decide in favor of the plaintiff, he is entitled to recover such an amount of damages as would legally compensate him for the loss he has sustained by reason of not receiving back his stock,—the loss he has suffered in consequence of Mr. Blandy's default in preserving it for him, and returning it to him; and that would be the price and value of the stock as it was at the time Mr. Hubbell received information from Mr. Blandy of the loss of the stock; and, in addition to that, he would be entitled to recover all dividends paid upon the stock from the time it came into his hands—that is, in Mr. Blandy's hands—up to the day when information of its loss was given to Mr. Hubbell, with interest at the rate of 6 per cent. per annum, to be computed on the value of the stock from the date when its loss was made known to Mr. Hubbell, and also to be computed on the dividends at the same rate from the dates when they were respectively payable."

It is contended upon the part of the defendant that this is not the rule by which plaintiff's damages are to be measured; that the conversion occurred, if at all, in the state of New York, and that whatever would be a good defense to the action if brought where the wrong was committed must be a good defense everywhere; that this rule extends to the measure of damages in actions *ex delicto*, for wrong or injury to personal property; and that there is no testimony in this case tending to show that defendant acted in bad faith. It is therefore contended that the true measure of damages was what it would have cost the plaintiff to replace the stock within a reasonable time after knowledge came to him of its alleged conversion by the defendant, and that the testimony shows that the value of the stock depreciated from $3 per share—which was the market value at the time

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the knowledge came to the plaintiff of its alleged conversion, and the one allowed by the jury—to $2.60 per share within 60 days from that date, and before the commencement of this suit. August 22, 1887, it had gone down to $2.20 per share. Counsel cite, in support of their proposition as to the measure of damages, the case of *Wright v. Bank*, 110 N. Y. 237 (18 N. E. Rep. 79). That was an action for the conversion of stock owned by the plaintiff. It appeared that the defendant acted in good faith in disposing of it, and the rule was there laid down by the court as follows:

"Justice and fair dealing are both more apt to be promoted by adhering to the rule which imposes the duty upon the plaintiff to make his loss as light as possible, notwithstanding the unauthorized act of the defendant, assuming, of course, in all cases that there was good faith on the part of the appellant. It is the natural and proximate loss which the plaintiff is to be indemnified for, and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has learned of the conversion of his stock, within which he could go in the market and repurchase it. What is a reasonable time, when the facts are undisputed, and different inferences cannot reasonably be drawn from the same facts, is a question of law."

This is, in substance, the language of the court in that case, which is quoted by defendant's counsel in their brief; but the court went further in the case, and said:

"We think that, beyond all controversy, in this case, and taking all the facts into consideration, this reasonable time had expired July 1, 1878, following the 9th day of May of the same year. The highest price which the stock reached during that period was $2,795, and, as it is not certain on what day the plaintiff might have purchased, we think it fair to give him the highest price it reached in that time."

Applying that rule to the present case, we think the result reached would not give the plaintiff a less amount

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of damages than was allowed him under the rule adopted by the court in its charge to the jury. The conversion took place in the fall of 1884, but the plaintiff was not notified of it until the fall of 1886. At that time the stock was of the value of $3 per share; and if we adopt the rule contended for by defendant's counsel, under the ruling of the court in *Wright v. Bank, supra,* at $3 per share, with interest upon this amount at 6 per cent. upon dividends to which the plaintiff would be entitled, the amount would be no less than the amount of the judgment actually rendered in the case. We therefore see no error in the case, and the judgment must be affirmed, with costs.

The other Justices concurred.

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HENRY C. RIPLEY v. JOHN EVANS, A STOCKHOLDER IN THE MICHIGAN CUSHMAN TELEPHONE COMPANY (A CORPORATION).

Corporations—Individual liability of stockholders—Constitutional law—Title of act—Class legislation—Statutes—Amendment by implication.

1. It is not necessary to issue and have returned unsatisfied an execution to any other county than that in which the principal office of a corporation is situated, or its business carried on, before proceeding to enforce the individual liability of the stockholders under How. Stat. §§ 4886–4899, although it may appear that the corporation had property or effects in another county.
2. Act No. 129, Laws of 1883 (3 How. Stat. §§ 3718*a*–3718*h*), section 7 of which provides for the enforcement of the individual liability of stockholders for labor and materials furnished for corporations organized under said act during the time they

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were stockholders, "at any time after an execution shall be returned not satisfied against such company," must be construed with Act No. 141, Laws of 1877, providing for the enforcement of the individual liability of stockholders, and the execution referred to in the later act is to issue to the county where the principal office of the corporation is situated, as provided in the 1877 act.

3. In a proceeding under How. Stat. §§ 4886–4899, to enforce the individual liability of stockholders, the return of the sheriff of an execution against the corporation, issued to the proper county, unsatisfied, is conclusive between the parties; citing *Michels v. Stork*, 52 Mich. 263.

4. Section 7 of Act No. 129, Laws of 1883, entitled "An act for the organization of telephone and messenger service companies," making stockholders individually liable for labor and material debts, is fairly embraced within the title of the act.

5. Act No. 141, Laws of 1877, providing for the enforcement of the individual liability of stockholders, is not unconstitutional by reason of the exemption from its operation of cases where the suit is for labor, and the action is brought by the person who performed the labor.

6. The provisions of chapter 130 of the Compiled Laws of 1871, under which the individual liability of stockholders was enforced by bill in chancery, was amended by implication by Act No. 141, Laws of 1877, which repealed all inconsistent acts, or acts giving any other or different remedy, or form of remedy, and the later act is not in conflict with section 25, art. 4, of the Constitution, which requires the re-enactment and publication at length of altered or amended sections.

Error to Eaton. (Hooker, J.) Argued July 2, 1891. Decided July 28, 1891.

Proceedings to enforce the individual liability of a stockholder. Defendant brings error. Affirmed. The facts are stated in the opinion.

James M. Powers, for appellant.

P. T. Van Zile, for plaintiff.

[The points of counsel are fully discussed in the opinion.—REPORTER.]

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LONG, J. On the 25th day of July, 1887, the Michigan Cushman Telephone Company, a corporation, was organized under the laws of this State, and was doing business as such corporation between the 1st day of August, 1887, and the first day of December, 1887. Between those dates it was engaged in constructing a line of telephone within the State of Michigan, and for that purpose, and for a part of the material to be used in said construction, purchased of the plaintiff a quantity of telephone poles, which were during the time aforesaid delivered and used in the construction of said line. The telephone poles were worth and were contracted for by the said corporation at the sum of $490.50. On the 25th day of February, 1889, a judgment was duly obtained in the circuit court for the county of Eaton, by the plaintiff, against the corporation, for the sum of $490.50, and costs taxed at $22.60. The judgment was rendered for the debt due the plaintiff for said telephone poles, and no part of the judgment has ever been paid. At the time of the organization of said corporation, and ever since, the principal office of said corporation has been in the city of Charlotte, Eaton county, Mich. On the 2d day of May, 1889, the plaintiff caused an execution to be issued out of said circuit court, which was delivered to the sheriff of said county, and was afterwards returned wholly unsatisfied.

On the 17th day July, 1889, an order was entered in the said circuit court on the application of the plaintiff, requiring the secretary of the Michigan Cushman Telephone Company to file in said circuit court and cause a statement under oath, disclosing the name, residence, and amount of stock held by each of said stockholders of said corporation. On the 25th day of October, 1889, the secretary of said corporation, in pursuance of said order, filed a statement, which showed that the defendant in

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this case, John Evans, together with four others, held each $10,000 in nominal amount of stock in said corporation. On or about the 15th day of November, 1889, the plaintiff filed a petition for judgment against the individual stockholders, and a citation was thereupon issued and served upon each of said stockholders, requiring them to show cause why judgment should not be rendered against them for the amount so recovered against said corporation. The respondent in this case and two other stockholders appeared in said cause, and filed separate answers to said petition. The default of the other two defendants was entered. The answer of this respondent alleged:

1. That at the time of the issuing and the return of said execution, and at the time of the filing of said answer, the said corporation had a large amount of property subject to levy and sale on execution, and more than sufficient to satisfy the same, which should be exhausted before judgment could be rendered against the individual stockholders.

2. That the law does not authorize a judgment to be entered against the individual stockholders for the debt described in the petition.

3. That the statute (Act No. 129, Laws of 1883) under the provisions of which said petition was filed, so far as it attempts to make the stockholders of said corporation individually liable for materials furnished for said corporation, is unconstitutional and void, for the reason that the title of said act does not cover that portion or section of said act which purports to make stockholders individually liable for materials furnished for such corporation.

4. That the object of such act is not sufficiently stated in its title.

5. That there is no law authorizing the proceedings by petition in a court of law to hold stockholders individually liable for debts contracted by such corporation, for materials furnished to such corporation.

The cause came on for trial before a jury in the circuit court for the county of Eaton, on the 23d day of

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July, A. D. 1890, and judgment was rendered against this respondent for the whole amount of the judgment recovered by the plaintiff against said corporation, being for the sum of $532.15. On the 25th day of November, 1890, an order apportioning said judgment was duly entered in said court and cause. On the trial of the cause the defendant offered to prove the amount of property owned by the Michigan Cushman Telephone Company at the time the execution against the corporation was returned unsatisfied. Upon objection being made to the introduction of this proof, the counsel for defendant stated to the court that he purposed to show by the secretary of the company that, at the time the execution was issued and returned, there was $8,000 worth of property belonging to the company, consisting of a line of telephone poles and wires extending from Lansing to Detroit, and situate in the counties of Ingham, Shiawassee, Genesee, Oakland, Wayne, and Clinton, but no property within the county of Eaton, where the action was brought, except the franchise of the company. The court sustained plaintiff's objection to this testimony. Counsel for defendant then offered to show that, at the time the execution was issued, this property was subject to levy and sale on execution, and that the company still owned said property situate in the above-named counties. This was ruled out by the court.

The errors relied upon for which it is claimed judgment should be reversed are:

1. The introduction in evidence by the plaintiff of the execution, the petition requiring the secretary of the company to file the statement showing the name, residence, and amount of stock held by each stockholder, and the statement filed by the secretary.

2. The refusal of the court to allow the defendant to show the amount of property held by the corporation at

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the time the execution was issued and returned unsatisfied.

3. The refusal of the court to allow the defendant to show by the witness Samuel Pollock that he, as sheriff, made no attempt to levy the execution upon the franchise of the corporation, or to find any other property, and, if he did, to show what he did do.

4. The ruling of the court in refusing to direct a verdict in favor of the defendant.

The reasons given for this last proposition are.

1. The statute under which the Michigan Cushman Telephone Company was organized is unconstitutional and void, so far as it undertakes to make stockholders individually liable for the debts of the corporation for materials, for the reason that said act is broader than the title, and is in conflict with section 20 of article 4 of the Constitution of the State of Michigan.

2. The said act makes an unlawful and unconstitutional discrimination in favor of persons furnishing material for such corporations.

3. By the terms of the act under which the Michigan Cushman Telephone Company was organized the remedy to enforce the individual liability of stockholders is by bill in chancery.

4. The act of 1877, being the act authorizing these proceedings and under which this petition is filed, is unconstitutional and void, for the reason that it gives a remedy to one class of persons, which by the terms of the act is denied to all others.

5. The said act of 1877 is so defective in its provisions as to be incapable of enforcement.

6. The execution issued against the Michigan Cushman Telephone Company should have been levied upon the franchise of the corporation, and such franchise sold, before the execution was returned unsatisfied, in whole or in part.

7. The corporation has property within the reach of an execution issued out of the court which should have been levied upon and sold before the execution was returned unsatisfied, and before these proceedings could be commenced.

We shall discuss the objections of defendant's counsel in the order in which they are raised.

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It appears that the following facts were stipulated by counsel for the respective parties:

"1. That on the 25th day of July, 1887, the Michigan Cushman Telephone Company, a corporation, was duly organized under and by virtue of the laws of the State of Michigan, and under and by virtue of said organization and said laws was doing business as said corporation between the 1st day of August, 1887, and the 1st day of December, 1887.

"2. That between the said 1st day of August, 1887, said corporation was engaged in constructing a line of telephone within the State of Michigan, and for that purpose, and for a part of material to be used in said construction, purchased of the plaintiff, Henry C. Ripley, a quantity of telephone poles, which were between the last aforesaid dates delivered and used in the construction of said line.

"3. That said telephone poles, so purchased and used as aforesaid, were worth and were contracted for the sum of $490.50, and that on the 25th day of February, 1889, a judgment was duly obtained, rendered, and entered in the circuit court for the county of Eaton, State of Michigan, for said sum of $490.50, upon which judgment costs were afterwards taxed at $22.60, and that no part of said judgment and costs has ever been paid.

"4. That at the time of the organization of said corporation, and ever since said organization, and now, the principal office of said corporation has been and is at the city of Charlotte, in the county of Eaton and State of Michigan."

The corporation was organized under Act No. 129, Laws of 1883. Section 3 of that act provides that "the stock of every such corporation shall be divided into shares of $100 each, and shall be deemed personal property." Section 7 of the act provides as follows:

"The stockholders of all corporations organized under this act shall be individually liable for all labor performed and materials furnished for said corporation during the time they were stockholders as aforesaid, which said liability may be enforced against any stockholder, founded on this statute, at any time after an execution shall be returned not satisfied against such

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company: *Provided, always,* that if any stockholder shall be compelled, by any such action, to pay such debts of any creditor, or any part thereof, he shall have the right to call upon all the stockholders to contribute their part of the sum so paid by him as aforesaid, and may sue them jointly or severally, or any number of them, and recover in such action the ratable amount due from the person or persons so sued."

It is provided by section 8 of the act that—

"Every corporation organized hereunder shall be subject to the provisions of chapter 130 of the Compiled Laws of 1871, so far as applicable, and of Act No. 168 of the Session Laws of 1881, approved May 26, 1881, entitled 'An act to provide for the assessment of and taxation of telegraph and telephone lines within the State of Michigan, and to repeal Act No. 77 of the Session Laws of 1879, approved May 20, 1879.'"

Chapter 130 of the Compiled Laws of 1871 contains the general provisions of the statute relating to corporations, and, in substance, contains the provisions of chapter 55 of the Revised Statutes of 1846, with the amendments thereto since that date.

In 1877 the Legislature passed an act entitled "An act to provide for the enforcement of the individual liability of stockholders of corporations." Act No. 141 (How. Stat. §§ 4886–4899). This act provides as follows:

"SEC. 1. That whenever, by the Constitution or laws of this State, the stockholders of any corporation are individually liable for any debts of such corporation, the remedy for the enforcement of such liability shall be as hereinafter prescribed and not otherwise: *Provided,* that this act shall not apply to cases where the suit is for labor, and the action is brought by the person who performed the labor.

"SEC. 2. No proceeding shall be taken to enforce such liability until after a judgment has been recovered against the corporation on account of such indebtedness, and an execution issued upon such judgment to the county in which its principal office is situated or its

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business carried on has been returned unsatisfied, in whole or in part.

"SEC. 3. Whenever judgment has been recovered against any corporation for an indebtedness for which the stockholders of such corporation are by law liable, and an execution has been issued thereon as above provided, and returned unsatisfied, the court, upon application of the plaintiff, shall enter an order in such suit requiring the secretary, or other proper officer of such corporation, within a time designated in such order, to file in said cause a statement, under oath, of the names and residences of all persons who appear by the books of such corporation, or that such officer has reason to believe were stockholders therein at the time the debt for which such judgment was recovered accrued, and the amount of stock held by each of said persons, and, upon service upon such officer of a duly-certified copy of such order, it shall be his duty to comply therewith.

"SEC. 4. The statement mentioned in the last preceding section having been filed, plaintiff may make and file in the case his petition in writing, setting forth:

"*First.* That he has obtained a judgment against the corporation, and the amount thereof.

"*Second.* That execution has been issued thereon, and returned in whole or in part unsatisfied, as the same may be, and the sum remaining unpaid thereon.

"*Third.* That the several persons named in such statement of the officer of the corporation were, at the date the debt accrued on which the judgment was rendered, stockholders in such corporation, and the amount of stock held by each.

"*Fourth.* What was the consideration received by the corporation for the debt on which such judgment was rendered; and praying that judgment may be awarded against said several stockholders in favor of the plaintiff for the sum so as aforesaid averred to be due from said corporation, and that a citation may issue from said court, under the seal thereof, to the said several stockholders, requiring them to appear in said cause on a certain day, to be therein named, and answer why judgment should not be entered against them as therein prayed."

This act further provides that on the filing of the petition the citation shall issue, to be served upon the stockholders, and that on the return-day the person so

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cited shall make separate and several answer in writing, signed by him, to such petition, and if the liability be denied, or facts shall be relied upon in defense against such charge of liability, such answer shall contain a statement of such facts, or the specific grounds of defense; and that the issue thus made by the petition and answer, whether of fact or law, shall be tried in the same manner as like issues of fact or law are tried. Section 7 of the act provides that—

"On the trial of any issue of fact formed as aforesaid, the judgment against the corporation, and the amount thereon remaining unpaid, as shown by the return of the execution thereon, shall be *prima facie* evidence of the sum due to the plaintiff, but not that the debt on which said judgment was rendered is one for which respondents are personally liable."

The act provides further that, after the several issues shall have been determined and judgment awarded against the several persons named in the petition, the court shall make an order in the cause apportioning between them the sum for which they have been severally adjudged liable, *pro rata*, according to the stock held by each.

Section 14 of the act provides as follows:

"All acts and parts of acts inconsistent with this act, or giving any other or different remedy, or form of remedy, are hereby repealed."

It appears that the proceedings by the plaintiff in this cause have been conducted strictly in accordance with the provisions of this act, and we think that, under the provisions of section 2 of the act, after the execution which shall have been issued upon the judgment rendered against the corporation to the county in which its principal office is situated, or its business carried on, has been returned unsatisfied, proceedings may then be commenced under

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the act for the enforcement and collection of the debt by judgment against the individual stockholders; and that it is not necessary to issue and have returned unsatisfied an execution to any other county in the State, although it may appear that the corporation had property or effects situate in such other county. The execution was issued, as appears by the record in this case, to the county where the principal office of the corporation was situated, that is, Eaton county, where its business was carried on, and returned wholly unsatisfied. It further appears that the corporation had no property, except its corporate franchise, situate within that county.

It is contended by counsel for defendant that Act No. 129, Laws of 1883, under which the corporation was organized, does not provide that the execution shall issue to and be returned by the sheriff of the county where judgment was obtained. This is true. Section 7 of that act makes stockholders liable individually for labor and materials furnished for the corporation during the time they were stockholders, "which said liability may be enforced against any stockholder, founded on this statute, at any time after an execution shall be returned not satisfied against such company." But these two statutes (Act No. 141, Laws of 1877, and Act No. 129, Laws of 1883) must be construed together, and, under the provisions of section 2 of Act No. 141 of 1877, the execution is to issue to the county where the principal office of the company is situated. The court was not, therefore, in error in refusing to permit the defendant to introduce testimony showing that the corporation had property outside the county of Eaton which might have been levied upon by execution.

It is insisted, however, that the court should have permitted the defendant to show, notwithstanding the sheriff's return, that the corporation had property situate

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within that county. All that is claimed for this is that the franchise of the company was liable to levy and sale on execution. The sheriff's return upon that question, as between these parties, is conclusive. *Michels v. Stork*, 52 Mich. 263, and cases there cited.

Counsel for defendant in his brief, however, contends that section 9 of chapter 130 of the Compiled Laws of 1871 authorizes the franchise to be levied upon, and that such franchise was property which should have been seized and sold before return of execution. The section reads as follows:

"When any judgment shall be recovered against any turnpike or other corporation, authorized to receive toll, the franchise of such corporation, with all the rights and privileges thereof, together with all their corporate property, both real and personal, may be taken on execution, and sold at public auction."

Section 13 of the same act provides as follows:

"The officer's return on such execution shall transfer to the purchaser all the privileges and immunities which by law belonged to such corporation, so far as relates to the right of demanding toll; and the officer shall, immediately after such sale, deliver to the purchaser possession of all the toll-houses and gates belonging to such corporation, in whatever county the same may be situated."

From the reading of these two sections it clearly appears that the words "other corporation," in section 9, mean other corporations having toll-houses and toll-gates, and do not refer to a different character of corporations to which other provisions of that chapter relate. We think, therefore, that there is no force in the claim that the sheriff should have levied upon and sold the corporate franchise of the company before he could return his execution unsatisfied. There was no property situate in that county except the bare franchise or right to erect telephone lines, which is not an exclusive right to these persons who are the organizers of the corporation.

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We may now pass to the principal question raised in the case, and that is upon the claim of defendant's counsel that the court was in error in not directing a verdict in favor of the defendant. The grounds of this claim have been heretofore set out. It is claimed that the act under which the company was organized is unconstitutional, so far as it undertakes to make stockholders individually liable for the debts of the corporation for materials, for the reason that the act is broader than the title, and is therefore in conflict with section 20 of article 4 of the Constitution. The title of the act is—

"An act for the organization of telephone and messenger service companies."

As we have before said, this act must be construed in connection with Act No. 141, Laws of 1877, which became a part of chapter 130, as it now stands, of the Compiled Laws of 1871, and having reference to different classes of corporations, and rights and liabilities of stockholders therein. The part of the act of 1883 complained of is section 7, which provides for the individual liability of stockholders for labor performed and materials furnished for the corporation. The claim made by defendant's counsel is that under this title the duties, liabilities, and obligations of the corporation might have been defined, and the method of carrying on the business of the corporation in its corporate capacity might have been provided for; but that when the Legislature attempted to include in the provisions of this act something which had no relation to the corporation in its corporate capacity in any way, and attempted to operate upon private individual rights, it was entering a new field, and that such provisions were not within the title of the act; and that any action of the Legislature, looking to the making or creating of an obligation which would not otherwise exist, ought to be clearly stated in the title of

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the act imposing such liability or obligation. We think this provision making stockholders liable for the debts of the corporation is germane to the organization of the corporation, and not a violation of the constitutional provision as claimed by defendant's counsel. This constitutional provision is—

"No law shall embrace more than one object, which shall be expressed in its title."

This provision requires that the title shall fairly indicate the general object of the law. Mr. Cooley, in his work on Constitutional Limitations, page 144, speaking upon the subject, says:

"The general purpose of these provisions is accomplished when a law has but one object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

It was said by Mr. Justice GRAVES in *Harrington v. Wands*, 23 Mich. 389:

"If we were to hold that no act can have any operation further than the title actually expresses, we should outrun the Constitution, unsettle much of the legislation of the last 20 years, and throw an obstacle in the path of future legislation which no human wisdom could overcome."

In *Johnson v. Higgins*, 3 Metc. (Ky.) 566, that court, speaking of similar provisions of their constitution, say:

"The constitutional provisions should receive a reasonable construction, and any provisions of the act directly or indirectly relating to the subject expressed in the title, and having a natural connection therewith, and not foreign thereto, should be deemed embraced by it."

This Court in *Ryerson v. Utley*, 16 Mich. 278, quote this language from the supreme court of Kentucky, and

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say: "We approve of the principle of this decision as thus stated." We are satisfied, within the previous decisions of this Court, that section 7 of the act of 1883, making stockholders individually liable for corporate debts, is fairly embraced within the title, and therefore not within the constitutional prohibition.

Counsel for defendant also claims that Act No. 141, Laws of 1877, is unconstitutional, for the reasons:

1. That it is class legislation.
2. That it amends or alters other statutes, without re-enacting or publishing at length the section to be altered or amended.

Upon the point that it is class legislation, counsel refers to section 1 of that act, which we have heretofore set out, and bases his claim upon the provision of that section which exempts claims for labor from the operation of the act. We think there is no force in this claim. All labor claims are treated alike, and provision is made for the enforcement of such claims under other statutes. The fact that the act of 1877 only includes claims for materials furnished the corporation, and expressly exempts labor claims from its operation, does not make the act class legislation, within the meaning which counsel seeks to put upon it. All that can be required in such cases is that the act shall be general in its application to the class to which it is intended to apply. It is a question of legislative discretion and policy to determine what class of claims shall be embraced within the act. Cooley, Const. Lim. 390.

Upon the second point it is urged by defendant's counsel that the act of 1877 takes away all other remedies provided by law for the enforcement of the individual liabilities of the stockholders of corporations, except where the suit is for labor, without re-enacting or pub-

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lishing at length the section to be altered or amended; and that, therefore, the act is in violation of section 25 of article 4 of the Constitution of this State.[1] Section 14 of the act of 1877 provides that "all acts and parts of acts inconsistent with this act, or giving any other or different remedy, or form of remedy, are hereby repealed." We need not discuss this question. The remedy for the enforcement of such claims prior to the act of 1877 was by bill in chancery. By the provisions of the act of 1877 the form of the remedy is changed so that after judgment against the corporation, and return of execution unsatisfied, a citation may issue to the stockholders to appear and answer, and show cause why judgment should not be rendered against them individually. By implication, chapter 130 of the Compiled Laws of 1871, in its provisions as to the enforcement of the liability against individual stockholders, was amended by the act of 1877. It has been repeatedly held in this State that a statute having amendatory effect by implication to repeal inconsistent acts is not in conflict with section 25 of article 4 of the Constitution, because not re-enacting and publishing at length the acts so altered and amended by implication. *People v. Mahaney*, 13 Mich. 481; *Underwood v. McDuffee*, 15 Id. 361; *Jones v. Commissioner*, 21 Id. 236; *Harrington v. Wands*, 23 Id. 385; *Mok v. Building Ass'n*, 30 Id. 511.

We have quoted these statutes, and dwelt upon them at great length, for the reason that this is the first case coming before this Court where the remedy to enforce the liability against individual stockholders has been sought under the provisions of act of 1877. We are sat-

[1] This section provides that "No law shall be revised, altered, or amended by reference to its title only; but the act revised, or the section or sections of the act to be altered or amended, shall be re-enacted and published at length."

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isfied that the Legislature intended by the act of 1883, under which the corporation was organized, to make the previous statutes having reference to the remedy over against stockholders a part of that act, and that the plaintiff has substantially followed the provisions of the several acts in the enforcement of his claim against the stockholders.

We find no error in the record, and the judgment must be affirmed, with costs.

The other Justices concurred.

THE AULTMAN & TAYLOR COMPANY (A CORPORATION) v. PERRY J. GORHAM AND FREEMAN L. DECKER.

Bills and notes—Surety—Parol evidence—Consideration.

1. A joint maker of a promissory note cannot limit his liability to that of an indorser by parol testimony that he signed as a surety, and that, by an agreement with the agent of the payee who took the note, he was to be released unless notified of its non-payment.
2. Where a mortgagor, in order to secure the release of the property and further time, gives the mortgagee his promissory note for the debt, which is signed by a third party at his request before its delivery, there is a sufficient consideration to hold both the maker and the surety.

Error to Missaukee. (Aldrich, J.) Submitted on briefs June 12, 1891. Decided July 28, 1891.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

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F. O. Gaffney (*C. P. Thomas*, of counsel), for appellants.

Sawyer & Bishop, for plaintiff.

LONG, J. This suit was brought in justice's court upon the following promissory note:

"$72.12. LAKE CITY, February 27, 1887.

"Nine months after date, I promise to pay to the Aultman & Taylor Company, or bearer, seventy-two & 12-100 dollars, at bank at Lake City, value received, with interest at the rate of 7 per cent. per annum.

"P. J. GORHAM.
"F. L. DECKER."

The defendant Decker, upon the trial before the justice, pleaded the general issue, and gave notice as follows:

"1. That he joined as maker of said note declared upon in the cause as accommodation merely, and never had any interest in the consideration, and never received any benefit, either directly or indirectly, on account of the note; and plaintiff knew when it was made, and when it received said note, that the defendant was only in fact surety upon it for Gorham.

"2. That said note was given as part payment for a certain saw-mill purchased of plaintiff by Gorham; that a short time after said note was given, to wit, some time in the month of May, 1887, said mill was nearly all consumed by fire, and on or about June 1, 1887, the plaintiff herein verbally agreed that, in consideration of all the remainder of said saw-mill not consumed by fire being turned over to it, it would cancel said note and return it to said Gorham; that said Gorham immediately informed said Decker of the said agreement, and discharge of the note; and that said Decker had always supposed that said note had been paid until a short time before the suit was brought.

"3. That said Decker has never received any notice of the presentment and non-payment of said note, as agreed

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between said plaintiff and said Decker when said note was executed."

The cause was tried before a jury, who returned a verdict in favor of the defendants. An appeal was taken to the circuit court for the county of Missaukee, where, upon a trial before a jury, the plaintiff had verdict and judgment by direction of the court. The defendants bring error.

It appeared upon the trial that the note was given in payment of a purchase by defendant Gorham of the saw-mill from the plaintiff. Defendant Decker claims to have signed the note at the request of Gorham and the agent of the plaintiff, and that he was a mere surety upon the note. Upon the trial he sought to show:

1. That he signed as a mere accommodation maker, and without any consideration moving to him.
2. That he executed it at plaintiff's request, and it was delivered to plaintiff upon condition that, if it was not paid at maturity, he would receive notice of the non-payment at once.
3. That the mill had been paid for and the note discharged.

Upon this last proposition the only claim made upon the trial was that, the mill for which the note was given having burned, the agent of the plaintiff thereafter agreed to take from the mill certain machinery, and give up the note. No claim is made that this agreement was ever carried out, or that the agent ever took possession of the machinery, or ever surrendered the note. Defendant Gorham testified that he wanted the agent to give up the note at that time, and to take the machinery, which he refused to do until he went and saw the attorneys of the plaintiff. From this testimony it is apparent that, if any such agreement was entered into, it was conditioned upon the approval of plaintiff's attorneys, as nothing further was done in regard to it.

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Counsel for defendants claimed upon the trial, and claim here, that, though the note was in form the joint note of the two defendants as makers, yet, defendant Decker being a mere surety, he had the right to show that the condition was annexed to it by which he was to be released unless notice was given to him of non-payment of the note at its maturity, and that, no notice having been given at once after it became due, he was therefore released from all liability upon it. This proposition cannot be acceded to by this Court. The note itself was the contract between the parties, and it cannot be permitted to be altered or varied by proof of an oral agreement or understanding between the parties made at or before the time of its execution. By the contract made, defendant Decker seeks to limit his liability to a mere indorser, entitled to a notice of non-payment. He does not stand in that position towards this note, and he had no right to introduce parol proof to show that such was the agreement, and the court was not in error in excluding it. *Cook v. Brown*, 62 Mich. 473.

Defendant, upon his first proposition, that he was an accommodation maker, and no consideration moved to him, claims that he cannot be held liable upon the note, under the ruling of this Court in *Kulenkamp v. Groff*, 71 Mich. 675. In that case it appeared, however, that the surety on the note did not sign until after the note had been executed by the maker and delivered to the plaintiff. In the present case it appears that the agent of the plaintiff went to defendant Gorham's saw-mill, and had practically taken possession of it under a chattel mortgage, and the defendant Gorham, in order to get more time, executed the note, and Decker signed it before it was delivered to the plaintiff's agent. This was a sufficient consideration, not only to hold the maker, but the surety.

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No fraud or mistake is claimed in the making of the note, and, under well-settled rules, the court very properly directed a verdict in favor of the plaintiff.

The judgment must be affirmed, with costs.

The other Justices concurred.

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LEVI W. HAINES v. THE BOARD OF SUPERVISORS OF THE COUNTY OF SAGINAW.

Mandamus—Accounting—Trial of issues—Reference.

1. The determination of the issues presented by the pleadings in this case involves an investigation of long accounts between the township and county, and a reference is ordered to the circuit court of Saginaw county, to the end that the account may be stated, and the facts submitted in a form which will not require the time and attention of the Supreme Court in investigating the array of figures presented.
2. It is further held that this is a case which may properly be referred by the circuit court to a referee under How. Stat. § 7378.

Mandamus. Argued June 30, 1891. Case remanded for trial of issues July 28, 1891.

Relator applied for *mandamus* to compel the respondent to allow the township of Thomastown a certain credit, and to provide for its payment. The facts are stated in the opinion.

Wisner & Draper (*Hanchett, Stark & Hanchett,* of counsel), for relator.

L. C. Holden (*George W. Davis,* of counsel), for respondent.

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PER CURIAM. This is a petition for *mandamus* to compel the county of Saginaw to allow the township of Thomastown a credit for $1,830.48 and interest, and to provide for the payment thereof. The claim grows out of charges claimed to have been made against the township by the county of Saginaw under Act No. 169, Laws of 1869.

It appears that at the April term of this Court, in 1886, a petition was filed by the Auditor General against the supervisors of the county of Saginaw, to compel that county to apportion $96,046.01 among the several townships of that county, and to collect the same, and cause that amount to be paid over to the State. It was claimed that that amount was due to the State from the county of Saginaw upon annual statements made and rendered to the county for payment and settlement from the years 1875 to 1885, inclusive. It appeared that a large portion of this claimed balance due to the State arose under the act of 1869. It was held that the losses arising under these five-year lists could not be charged back to the county, and that such losses must fall upon the State.[1] It appears from the petition in this case that Saginaw county never paid over to the State the moneys so charged back. The petition, however, alleges that the county each year, as it was charged with the above losses, charged over against the township of Thomastown its proportion thereof, amounting in all to the sum of $1,830.48, and which it is claimed the township has paid over to the county, and it is to compel the payment of this that the petition is filed.

The respondent by its answer denies that this amount has ever been paid by the township to the county, and claims that the township is indebted to the county in

[1] See *Auditor General v. Supervisors of Saginaw Co.*, 62 Mich. 579, 591.

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large sums of money, which has never been settled for or paid. The answer sets up what is claimed to be the state of the account between the county and township.

The relator presents a replication to the answer, bringing in certified copies of the records of the county and township, which he claims show the state of the account between the county and township, which materially differs from the state of the account as claimed by the respondent.

Issues are thus made which cannot be determined upon the papers as now presented. If the issues could thus be determined, it would involve the investigation of these accounts and an array of figures which we do not feel called upon to investigate upon an application for a *mandamus*.

The whole matter will be remanded to the circuit court for the county of Saginaw upon the issues made by the pleadings, to the end that the account may be stated between the county and township, and the facts settled presented to this Court in a form which will not require the time and attention of this Court to investigate the array of figures which is now presented.

We think it is a case which may properly be referred by the circuit court to a referee under the provisions of How. Stat. § 7378.

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WILLIAM WILSON ET AL. v THE TOWNSHIP BOARD OF BURR OAK.

Highways—Refusal of commissioner to lay out—Appeal—Petition—Notice—Jurisdiction.

1. No appeal lies to the township board from the *refusal* of a highway commissioner to lay out a highway.
2. The following propositions are summarized from the opinion of Mr. Justice LONG:

   a—An application to lay out a highway, which fails to state that the applicants are freeholders of the township, confers no jurisdiction upon the commissioner.

   b—The failure of the commissioner to show in his return that notice was served upon one of the occupants of the land through which the proposed highway is to be laid is fatal to the validity of his proceedings.

   c—It is error for a township board to hear an appeal from a highway commissioner when two of the sitting members are financially interested in the result of the appeal.

Certiorari to township board to review proceedings laying out a highway on an appeal from the highway commissioner. Argued June 5 1891. Proceedings quashed July 28, 1891. The facts are stated in the opinion.

T. C. Carpenter, for petitioners.

J. J. Stanton, for respondent.

LONG, J. This is a *certiorari* to the township board of the township of Burr Oak, St. Joseph county, to review its action in overruling the proceedings of the highway commissioner of that township, who refused to lay out a highway, and the order made by the township board laying out and establishing the same. The errors assigned upon which the writ of *certiorari* was allowed are:

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"1. Said board erred in allowing the said members objected to, to sit, under the evidence produced, without a showing to the contrary, to hear and determine the questions before them, on account of personal interest.

"2. The board erred in refusing to quash the proceedings for the want of the proper service of notice on the owners and occupants of said lands prior to the laying out of the same by the commissioner.

"3. The board erred in deciding that proper notice was given of the said appeal.

"4. The said board erred in laying out said highway under the record and evidence, or that they were duly authorized to lay out said highway after such objections were made.

"5. Deponent claims that the whole proceedings to lay out said highway are void, for the reason that a part of the owners and occupants of the said lands to be condemned for said highway purposes were not notified by the highway commissioner of said township of the said proceedings to lay out the same, and that the said board had no jurisdiction to act in the premises under the statute on appeal, where the commissioner has refused to lay out a highway.

"6. The said board erred in not assessing to Lucy Wilson her share of the damages to her, instead of assessing the whole to William Wilson

"7. The said board erred in fixing the payment of the damages to the several parties February 1, 1892, after appropriating the lands.

"8. Also for the reason that it nowhere appears who were the actual owners of said lands to be taken away, nor why substituted service was made, instead of personal, on the owners and occupants."

It appears from the return that the petition was presented to the highway commissioner, signed by about 30 residents of the township, to lay out a highway therein, in pursuance of which, on August 18, 1890, the commissioner gave the notice required by statute, that he would meet at the house of William Wilson, in said township, on the 1st day of September thereafter, at 10 o'clock A. M., to proceed to view the premises described

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in the application and notice, and ascertain and determine the necessity of laying out the highway described in the application and notice, and to appraise the damages thereon. The proof of service of these notices is by the affidavit of the commissioner, subscribed and sworn to on the 25th day of August, 1890, in which he states that on the 19th day of August he served notice (of which a copy was attached) upon William Wilson and George Morris, and on the 20th day of August, 1890, upon E. Brown, occupants of these lands through which the proposed highway was petitioned to be opened, by delivering said notices personally to the said William Wilson and George Morris, and leaving said notice at the residence of said E. Brown with one of the family, and acquainting her with its contents. The affidavit further shows that the commissioner also posted notices of like form in three public places in the township, showing the time and places of posting the same.

The commissioner made a return of his proceedings, showing the application made to him by more than seven residents of said township to lay out the highway; the giving of the notice as required by law; and that on the 1st day of September, 1890, at 10 o'clock A. M., he was present at the place named in such notice, to view the premises, and determine the necessity of laying out such highway; and he returned, further, that he did not consider such highway necessary to the public good, and that he denied such application.

An appeal was taken by one Henry Lamp, a resident and freeholder of said township, to the township board; the applicant stating that he conceived himself aggrieved by the determination of the commissioner of highways in refusing to lay out the same, and that the appeal was made to reverse the entire decision of said highway com-

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missioner. Notice of this appeal was given by the township clerk to the highway commissioner, fixing the 30th day of September, 1890, at 10 o'clock A. M., to view the premises and hear the appeal of said Henry Lamp from the determination of the commissioner. Like notice was served upon Henry Lamp, and proof of service of this notice was filed with the township board.

At the time of the meeting of the board affidavits were filed with the board showing that William Whitmer, a member of the township board before whom the appeal was to be heard, prior to the meeting of the commissioner to lay out a highway, approached certain resident freeholders of that township, and solicited them to sign the petition to lay out the highway, and represented that it was a necessity, and ought to be laid out. Two such affidavits were filed with the board. An affidavit was also filed with the board in which it was shown that James C. Bishop, one of the members of said township board, was highway commissioner of that township in 1863, and a petition was presented to him to lay out and open such road during that year, upon which he expressed his opinion in favor of said road; and also that William Whitmer, a member of the board, was the owner of real estate a short distance north of the western terminus of said proposed highway, and interested personally and financially in laying out the same. A remonstrance was also presented to the board on that day signed by over 100 residents of that township, against the laying out or establishing of the highway on said proposed line. These affidavits and this remonstrance were laid before the township board, and objection made to William Whitmer and J. C. Bishop, two members of said board, as incompetent and not qualified to sit and try said cause of said appeal, or to decide the necessity of laying out

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said road, or hear and determine said cause on the evidence, for the reasons:

"1. That said parties are interested in laying out said highway.

"2. That said Bishop and Whitmer have already expressed their opinions in favor of the same before hearing any of the evidence or objections to the laying out of the same."

A request was thereupon made to the board to remove said members from said board, at its then sitting, and to appoint others to fill their places, qualified to sit and hear and determine the case according to the statute.

It was also objected before said board that the affidavit of service of notice to lay out this highway, and of the meeting for that purpose, on the occupants and owners of land through which it was to be laid out, did not show that notices were properly served, and therefore the board had no jurisdiction of the cause on appeal.

The township board met according to the notice, and there were present J. C. Bishop, supervisor, Daniel Gillett and William Whitmer, justices of the peace, and A. C. Himebaugh, deputy-clerk. After the board had heard the arguments of counsel opposed to the laying out of the highway, it overruled the motions made, and, after viewing the premises, voted to lay out the highway according to the petition, and awarded damages, as follows:

"To William Wilson	$100
To Marcia M. Morris	100
To the west half of the N. W. quarter of sec. 27	75
To the east half of the N. E. quarter of sec. 28	75
To non-resident lands, N. W. quarter of N. E. quarter of sec. 28	no damages
To land occupied by E. Brown	75
To north half of N. W. quarter of sec. 28	75
Total	$500

"The damages to become payable Feb. 1, 1892."

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The township board, in its return of its proceedings, dated October 1, 1890, and filed in the township clerk's office, says, among other things:

"That whereas, at least 10 days' notice of the hearing of said appeal has been given to said commissioner and to said appellant; and the township board having, at the time and place specified in said notice, proceeded to hear the proofs and allegations of the said parties, and duly considered the same, and being satisfied from such proofs and allegations that the determination of the said commissioner in denying the petition was erroneous and unjust, and that the same should be and is hereby vacated and set aside, and the prayer of the petitioners to lay out the road is granted, said road to be laid as follows: Commencing at the corner of sections 20, 21, 28, and 29; thence due east, on the section line, to intersect the highway running east and west between sections 22 and 27, township of Burr Oak, county of St. Joseph, State of Michigan."

This finding and return is signed by the members of the board.

The affidavit for the writ of *certiorari* was made by the attorney for William Wilson, Marcia Morris, Ezra Brown, and Clara Wilson.

The claim of counsel is that no appeal is provided for from the determination of the highway commissioner in refusing to lay out a highway, and the township board erred in assuming jurisdiction in the case of said appeal and to lay out said highway, and that, therefore, its proceedings are void; that the statute only provides for an appeal from the highway commissioner's determination in such matters where he lays out the highway, alters a highway, or destroys a highway, but not where he refuses to do so.

How. Stat. § 1302, provides that—

"Any person, being a freeholder or a holder of lands by homestead right within the township, who may conceive himself aggrieved by the determination of a com-

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missioner in laying out, altering, or discontinuing any highway, or in his award of damages, may, within ten days after such determination, appeal therefrom to the township board."

This section provides that the appeal shall be made in writing, signed by the appellant, addressed to the township board, and filed with the township clerk, who shall give notice of the meeting of the board to hear the appeal, and fix the time and place of said meeting.

Sections 1303 and 1304 provide as follows:

"SEC. 1303. The township board shall proceed, at the time and place specified in the notice, to hear the proofs and allegations of the parties, and may examine persons on oath, in respect to the matter of such appeal, and their decisions shall be conclusive and final. Such decision shall be reduced to writing, and signed by the board making the same, and filed in the office of the township clerk, and, together with all other papers relating to such appeal, shall be recorded as part of the record of the road No commissioner from whose determination an appeal has been taken, and who may be a member of the township board, shall act on such appeal.

"SEC. 1304. In case the determination of the commissioner upon which an appeal is taken be confirmed, or if his award of damages shall not be increased, the appellant shall pay the whole amount of costs of such appeal, such costs to be ascertained and determined by the township board, and deducted from the amount of damages awarded."

We find nothing in these provisions of the statute giving an aggrieved party the right to appeal from the determination of the commissioner in refusing to lay out a highway. The statute only contemplates an appeal from the determination of the commissioner in laying out a highway, or altering or discontinuing it, or an appeal from his award of damages in laying out, altering, or discontinuing the same, and therefore it must be held that the board had no jurisdiction to entertain the appeal, or to proceed to overrule the decision of the commissioner

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in that regard, and then, upon its own motion, to view the premises, and determine, as a township board, the necessity of laying out the highway, and to lay out and establish it, and to award damages therefor.

We think the proceedings of the township board were illegal and void for several other reasons:

1. The petition addressed to the commissioner for the laying out of the highway does not purport to be signed by freeholders, as required by How. Stat. § 1296. The petition states that the petitioners were legal residents of said township, but does not state that any of them were freeholders of such township, and therefore the commissioner had no jurisdiction to proceed under the petition, and, the commissioner not having jurisdiction to proceed, the township board, upon the appeal, could not itself proceed upon this defective petition.

2. The finding of the township board shows that William Wilson, Marcia M. Morris, and E. Brown were all occupants of lands through or adjoining which it was proposed to lay out the said highway, and yet the return of the highway commissioner shows that he only served notices upon William Wilson, George Morris, and E. Brown. It does not appear, therefore, that Marcia M. Morris was served with any notice by the commissioner before his proceedings were taken to determine the necessity of laying out the highway. This was a fatal defect, and, the commissioner having no jurisdiction to lay out a highway, the township board could not under such proceedings obtain jurisdiction to lay out the same.

3. The affidavit for the writ of *certiorari* alleges that Clara Wilson was also the owner and occupant of lands through or adjoining which it was proposed to lay out the said highway. No notice was served upon her, as appears from the return of the highway commissioner, and for that reason he acquired no jurisdiction to lay

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out the same, and the township board, upon appeal, had no jurisdiction.

4. We think, also, that the township board erred in proceeding to lay out the highway, if Whitmer and Bishop, two of the members of said board, or either of them, were financially interested in its being laid out. The board makes no return to this allegation in the affidavit upon which the writ of *certiorari* was issued, and there being no contradiction of the affidavit, we must take the affidavit as true.

It follows that the proceedings of the township board in laying out this highway must be quashed and vacated; the plaintiffs in the writ of *certiorari* to recover costs.

The other Justices concurred.

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WILLIAM PURVIS, JOHN PURVIS, AND WILLIAM HOLDEN v. MILTON H. BUTLER.

Partnership—Liability to third parties—Joint obligation—Parties defendant.

1. In a joint obligation, each person is bound for its entire fulfillment, and, in the absence of a plea in abatement, may be proceeded against to judgment and execution.
2. Persons entering jointly into an undertaking may be copartners, and the joint interest makes them liable whether they are partners or not.
3. The question whether a creditor who takes a share in the profits, for the use of money advanced, occupies the relation of creditor or partner, must be determined by the agreement of the parties, as between themselves, and, as to third persons who deal with them, must be measured by their rights.
4. Parties who have advanced money for the prosecution of a business, and agree to make further advances, and to receive

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interest on the indebtedness thus created, and also to receive and apply the profits in its liquidation, succeed to the entire proprietorship of the business, and are liable as partners to third persons upon contracts entered into in carrying on the same.

Error to Macomb. (Canfield, J.) Argued June 5, 1891. Decided July 28, 1891.

Assumpsit. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

James H. McDonald, for appellants, contended for the doctrine of the opinion.

Charles K. Latham, for defendant, contended:

1. A promise to pay the debt of another after it has been contracted must not only be in writing, but must be supported by a consideration, to take the debt out of the statute; citing *Rood v. Jones*, 1 Doug. 188; *Corkins v. Collins*, 16 Mich. 478; *Pratt v. Bates*, 40 Id. 37; *Mallory v. Gillett*, 21 N. Y. 412.
2. There is no testimony tending to show a substitution of defendant for Roberts or Gauthier; hence there was no fact of such substitution to be submitted to the jury. There being no such substitution, no novation of parties, no liability was created against defendant; citing *Welch v. Marvin*, 36 Mich. 59; *Mulcrone v. Lumber Co.*, 55 Id. 622.
3. The relations of the parties as created by the first agreement, set forth in the opinion, were not such as to make them partners as between themselves, nor was the conduct of defendant in the matter of the fishery business such as to make him a partner as to third persons; citing *Beecher v. Bush*, 45 Mich. 188.
4. This Court has effectually disposed of the question of defendant's liability under such an undertaking as the second agreement, on the ground of want of privity, in *Pipp v. Reynolds*, 20 Mich. 88; *Turner v. McCarty*, 22 Id. 265; *Hicks v. McGarry*, 38 Id. 667.

CHAMPLIN, C. J. The plaintiffs were fishermen carrying on their business around Duck Island, where they resided.

C. W. Gauthier had, prior to 1889, been engaged in

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purchasing fish of the fishermen at Duck Island and West Selkirk, Manitoba, and Ephraim K. Roberts and Milton H. Butler had advanced him money to a large amount in his business, and held mortgage security upon his property. Carlos E. Warner also held mortgage security upon some of Gauthier's property. On the 8th day of February, 1889, an agreement was entered into between Charles W. Gauthier of the first part, Butler and Roberts of the second part, and Warner of the third part, as follows:

"This agreement, made and entered into this 8th day of February, A. D. 1889, between Charles W. Gauthier, of Windsor, Ontario, of the first part, Milton H. Butler and Ephraim K. Roberts, of Detroit, Michigan, of the second part, and Carlos E. Warner, of the same place, of the third part, witnesseth:

"*Whereas,* Charles W. Gauthier is the owner of an extensive fishery business and large property, used in and in connection therewith, at or about Detroit, Bay City, Duck Islands, and Manitoba, and a stock of frozen fish situated at and about the city of Detroit, in the State of Michigan, and a stock of fish at West Selkirk, in the province of Manitoba, Canada;

"*And Whereas,* said Milton H. Butler and Ephraim K. Roberts have a first mortgage on a large portion of the property of said Gauthier;

"*And Whereas,* said Warner has mortgages and deeds covering a large portion of said property, real and chattel;

"*And Whereas,* said Gauthier is in default on each of said mortgages, and the mortgagees therein have a right, by virtue of their mortgages, to take immediate possession;

"*And Whereas,* it is deemed advisable by all parties concerned to carry on said business under an arrangement which will protect their respective and several interests, with a view of paying and liquidating said indebtedness at the earliest possible moment:

"Now, therefore, it is agreed between said parties as follows:

"1. The indebtedness of the said Gauthier to the said Milton H. Butler and Ephraim K. Roberts, which is con-

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templated and covered hereby, is fixed and established at the sum of eighty-two thousand dollars ($82,000), with interest thereon at the rate of seven (7) per cent. per annum from the date thereof, which said Gauthier hereby agrees to pay.

"2. Said Ephraim K. Roberts shall have the general management of the said fishery business for the benefit of all concerned in the property, and, to carry out the purposes of this agreement, said Roberts shall have authority to make all contracts of importance connected with said business, either in the name of said Gauthier or in his own name, as he shall deem best. He shall have entire and sole control of the finances of the said business, including the sale and disposition of all products of said business, and the handling of all money that goes into or is made from said business, except as is hereinafter stated: *Provided*, however, that he, the said Roberts, shall keep correct and accurate books of account of said business, in which all the details and transactions of said business shall be fully and plainly entered. Said Gauthier and Butler, or his or their agents and servants, shall at all times have free access thereto, with full authority to examine, inspect, and copy from, at any and all reasonable times, without let or hindrance.

"3. Said Warner shall also act as trustee in conjunction with said Roberts, and shall at all times have free access to said business, and to the books of account and details of the same, with full authority, either by himself or under his direction, to examine, inspect, and copy from said books of account, at any and all reasonable times, without let or hindrance; and in case a difference of opinion shall arise between said Gauthier and said Roberts in reference to said business, and in carrying on and conducting the same, then said Warner shall be consulted in reference thereto, and shall have an equal voice with said Roberts in reference to any course or policy to be pursued; it being understood, however, that the conduct and management of said business in the main shall rest with and be vested in said Roberts. He shall devote his entire time and attention to the same.

"4. Said Gauthier shall have the general charge of the fishery business, and shall give his attention in the main to matters outside of the office, subject, however, to the approval of said Roberts in all matters of importance.

"5. Said Roberts and said Gauthier severally agree to

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give to said business their undivided time and attention from and after the first day of March, 1889, until the first of March, 1893, unless this agreement is sooner terminated; and they severally agree to use their utmost diligence to make said business a success, and faithfully perform their duties in accordance with the terms of this agreement, and the general purpose thereof, to the end that the said indebtedness of the said Gauthier may and shall be as expeditiously and rapidly paid off as possible. Said Roberts and said Gauthier shall each draw from the proceeds of said business an annual salary of thirty-six hundred dollars ($3,600), payable monthly, besides legitimate expenses incurred in said business, which shall be charged to the expense account.

"6. Said Gauthier shall, as speedily as possible, dispose of the stock of fish now on hand, wherever situated, and the proceeds thereof, after deducting the expenses of said sale, shall be applied as follows:

"*First.* To the payment of the indebtedness secured by any and all the mortgages and deeds to said Warner.

"*Second.* To the payment of any indebtedness for wages now outstanding.

"And, as security for any balance of indebtedness secured by said mortgages and deeds held by said Warner, he, the said Warner, shall hold the said mortgages and deeds now held by him, and shall be at full liberty, at any and all times, to enforce the same, according to the terms and conditions of said mortgages.

"7. Said Charles W. Gauthier agrees to make, and said Milton H. Butler and Ephraim K. Roberts agree to indorse, paper sufficient to raise whatever money may be necessary to carry on said fishery business successfully; and said Gauthier agrees to give mortgages to said Butler and Roberts on all property not now mortgaged to them, and mortgaged to said Warner, for the purpose of securing said future advances; and all mortgages now held by said Butler and Roberts shall also be held and used as security for such future advances; and all proceeds, profits, and avails of said business, after the payment of the expenses, shall first be applied towards the payment and reduction of said advances.

"8. The proceeds realized from the carrying on of the said fishery business shall be applied by said Roberts as follows, and in the following order:

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"*First.* In paying the expenses of said business, including all unsecured indebtedness contracted therein by said Roberts or by his authority, and any advances made for the purpose of carrying on such business.

"*Second.* In paying the interest on said indebtedness secured by said mortgages to Butler and Roberts, and upon any outstanding indebtedness, if any, secured by said mortgages and deeds to said Warner, and also interest upon the mortgages covering the 'Duck Islands,' so called, and also the interest upon the mortgage of Mary Gauthier to the Citizens' Savings Bank.

"*Third.* In paying any indebtedness now existing for wages, and also all outstanding indebtedness, in sums not exceeding two hundred dollars to distinct and several creditors, and to an extent not exceeding two thousand dollars in the aggregate.

"*Fourth.* In paying the minimum amount mentioned in the following ninth paragraph of this agreement during the respective years therein mentioned.

"*Fifth.* To pay from the residue of the proceeds of the said business the balance of the indebtedness secured by a mortgage to the Citizens' Savings Bank, executed by Mrs. Mary Gauthier, for the sum of five thousand dollars and interest.

"*Sixth.* To pay such part of the outstanding unsecured indebtedness of said Gauthier as may be settled or compromised by said Gauthier, or said Gauthier and Roberts, and as said Roberts may consider it in the interest of the business or said Gauthier to pay.

"*Seventh.* The balance to be applied as rapidly as possible in reducing the indebtedness to said Roberts and Butler hereinbefore mentioned.

"9. It is further agreed that the mortgages so held by the said Butler and Roberts shall continue existing liens during the continuance of this contract, and that such mortgages shall not be enforced so as to prevent the carrying out of this agreement, provided that the aggregate indebtedness for which said mortgages to Butler and Roberts stand as security shall be reduced five thousand dollars ($5,000) by March 1, 1890, and ten thousand dollars ($10,000) during each succeeding year, and entirely paid March 1, 1893: *Provided,* however, that the said Roberts shall devote himself to the best of his ability to reduce said mortgages as rapidly as possible: *And provided,* further, that if said indebtedness is not reduced as above provided, or if said Gauthier fails to conform in any material respect to this agreement, then, at the option of the said mortgagees, said mortgages may be enforced, and this agreement abrogated.

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"10. Said Butler and Roberts hereby agree to surrender to said Gauthier as canceled all commission notes made by said Gauthier, and now held by them, or either of them.

"11. It is further agreed that when said indebtedness shall be reduced to the sum of twenty-five thousand dollars ($25,000), then said Gauthier may, at his option, execute a mortgage to said Roberts and Butler upon the property and effects of said business for said sum, with interest at the rate of seven per cent. per annum, when the said Roberts shall surrender, retransfer to, and reinvest in the said Gauthier the management and control of said business; and the said Gauthier shall have the privilege at any time of terminating this agreement by paying the indebtedness secured by said mortgages herein mentioned, in which event said business shall be surrendered and said property turned over to him; or to any one he may designate.

"This agreement shall take immediate effect.

"In witness whereof said parties have hereunto set their hands and seals the day and year first above written.

[Signed] "CHARLES W. GAUTHIER.
"M. H. BUTLER.
"EPHRAIM K. ROBERTS.
"C. E. WARNER."

Afterwards Butler succeeded to the rights of Roberts and Gauthier by the following agreement:

"This memorandum of agreement made this seventh day of January, 1890, between M. H. Butler of the first part, E. K. Roberts of the second part, and C. W. Gauthier of the third part, witnesseth:

"1. Said parties, each with the others, in consideration of the agreements hereinafter expressed, agree to and do hereby cancel the within contract, and the rights of each thereunder.

"2. Said Roberts and said Gauthier, in consideration of said Butler's agreement hereinafter expressed, hereby agree to assign and set over, and do hereby transfer, to said Butler all the fish now under their control and owned or under the control of E. K. Roberts, manager, the same being about four hundred tons at West Selkirk, Manitoba, and about two hundred tons at Sandwich,

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Windsor, Chicago, and Detroit; also all and singular the property and interests in property of all kinds used by or connected with the fish business conducted by E. K. Roberts, manager; and said Roberts, for the same consideration, hereby transfers to said Butler all his rights and interests in chattel mortgages and securities of all kinds heretofore taken from said Gauthier by said Butler and said Roberts, and by each of them.

"3. Said Butler hereby agrees, in consideration of the agreement of said Roberts and said Gauthier above mentioned, to take up as indorser, as they come due, all those notes heretofore made by said Gauthier and indorsed by said Butler and said Roberts, and those made by said Roberts and indorsed by said Butler, on which notes the money has been raised to carry on said fish business, and which have been discounted at Detroit, Mount Clemens, and Ann Arbor; but, in the taking up and payment of said notes as the indorser thereof, said Butler waives no rights by reason of this agreement; and said Butler further agrees to take charge of and sell said fish as he best can, and apply the net proceeds therefrom to reimburse himself for the money paid out in taking up said notes so far as the same may go, and take charge of all other property and interests therein transferred to him, and use and dispose of the same to the best advantage of the parties hereto, in taking care of their said indebtedness. Said Butler further agrees to take care of the running expenses in connection with the disposition of said fish and said property, and the accounts and notes now payable for running expenses heretofore incurred.

"M. H. BUTLER.

"EPHRAIM K. ROBERTS.

"*Dated January 7*, 1890.

"I hereby assent to the above agreement, in so far as it relieves Ephraim K. Roberts from the management and conduct of the business specified therein, and also in so far as said Roberts transfers to said Butler all his rights and interests in all chattel mortgages and securities of all kinds heretofore taken from me by said Butler and said Roberts, and by each of them: *Provided*, however, that all rights and remedies under said agreement, and all claims for damages and other liabilities thereunder in my favor for any violation of said contract, if

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any, by said Butler and Roberts, or either of them, shall be reserved.

"C. H. GAUTHIER.

"*Dated January* 15, 1890."

After this agreement of February 8, 1889, was entered into, Roberts went to Duck Island, and represented to plaintiffs William and John Purvis that there was a company formed by Mr. Roberts and Mr. Butler, of which he was president and manager, who were engaged in the fish business, and employed them to work for the company; and they fished and sold the fish to this company represented by Roberts, and within three months furnished them nearly $2,000 worth of fish. They received some payment, and Roberts gave his note for the balance of $961.53, dated November 2, 1889, payable in 45 days thereafter to Purvis Bros. & Co., the plaintiffs in this suit.

William Purvis, Jr., claims that he was engaged to work for this firm composed of Roberts, Butler, and others in running a fishing dock at West Selkirk, at $50 a month. This account he assigned to plaintiffs before suit brought. He testified that he saw Butler, and asked about his wages, and he expressed surprise that he had not been paid before, and said it was a shame, and he intended to pay the account inside of 30 days, and did pay him then $39, leaving a balance of $700. This was February 12, 1890. Butler also made some payments upon the note given to Purvis Bros. & Co.

At the close of the plaintiffs' testimony, the court took the case from the jury, holding that the contract entered into upon the 8th day of February, 1889, did not create a partnership, and that Butler was not liable as a partner.

It was not necessary that the partners should have all

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been joined as defendants in the suit. In a joint obligation, each person is bound for its entire fulfillment, and, in the absence of a plea in abatement, may be proceeded against to judgment and execution. Persons entering jointly into an undertaking may be copartners, and the joint interest makes them liable whether they are partners or not.

In the contract under consideration the parties concerned agreed to carry on the business under an arrangement which should promote their several interests, with a view to paying and liquidating the indebtedness. The indebtedness covered by the contract to Butler and Roberts was agreed upon as $82,000. Roberts was to have the general management of the fishery business for the benefit of all concerned in the property, and, to carry out the purposes of the agreement, was to have authority to make all contracts of importance connected with the business, either in his own or Gauthier's name, as he should deem best. He had authority under this agreement to make the contracts under which the plaintiffs claim. There can be no doubt about that. Who is responsible for the contracts which the parties authorized him to make? Manifestly those for whose benefit they were made. He is clothed with entire control of the finances of the business, and all sales and disposition of the products of the business, and the handling of all money that goes into or comes from the business, except as therein stated. The exceptions are contained in the eighth clause of the contract, and under the first subdivision Roberts should have paid the note held by the plaintiffs before applying the money received to the other purposes specified; but, if he did not, the other parties to the contract are not relieved from their liability to pay as joint contractors. These purchases were made

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under an agreement for their benefit and on their account. These contracts are as much the contracts of all the parties to the agreement as they are those of Roberts. Here was a community of interests, an enterprise in which the secured indebtedness of the second and third parties and the labor and business of the first party were embarked as capital, and the profits arising were to be shared and applied to a definite purpose. Their liability does not depend upon their intention to assume the obligation. As to third persons, individuals are often held liable as partners when, as between themselves, it is expressly agreed that they shall not be regarded or held as such. *Moore v. Davis*, 11 Ch. Div. 261; *Van Kuren v. Manufacturing Co.*, 13 N. J. Eq. 302; *Beecher v. Bush*, 45 Mich. 188.

It does not lie in the mouth of the defendant, Butler, to say:

"It is true, I agreed that Roberts should purchase the fish to supply the business, and employ help, and that I should receive the benefit of such purchases and labor, and that I also agreed that I would lend my credit still further to furnish means to carry on the business; but I am not liable for the obligation he has created for carrying it on, in which we were jointly interested."

On the contrary, it is plain that the benefit derived from the sale of the property purchased, which has been received from the plaintiffs in such a manner as to create a privity of contract between them and him, furnishes a basis of the implied contract to pay for the property so purchased. The fact that the control and management of the business was placed in the hands of Roberts does not determine that the relation of partners did not exist. It was Butler's right to have the business conducted in accordance with the agreement, although he was to take no part in its management. He had reserved the right,

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which he had without its being expressed, to examine the books kept by Roberts in order to see how he was conducting the business, and to compel him to observe the terms of their contract. The fact that the business was being carried on by his agreement, and for his benefit, shows that he was a principal. *Frowde v. Williams*, 56 Law T. (N. S.) 441. And see *Leggett v. Hyde*, 58 N. Y. 272; *Cumpston v. McNair*, 1 Wend. 457; *Beecher v. Bush*, 45 Mich. 188.

The question whether a creditor who takes a share in the profits, for the use of money advanced, occupies the relation of creditor or partner, is involved in considerable perplexity. It must be determined by the agreement, as between themselves, and as to third persons must be measured by the rights which third persons have who deal with them. In the present case the parties who had advanced and who agreed that they would advance money for the business were to receive interest on their money, and were also to receive and apply the profits in liquidation of the indebtedness to them; in other words, for a series of years they were to receive the whole avails of the business, until the agreement expired by limitation of time, or until sooner terminated by their being paid for all advances. This gave to the parties the entire proprietorship of the business, and rendered them liable as partners to third persons for this contract in carrying it on. We think the case should have been submitted to the jury.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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SUSAN A. BUSH v. DAVID P. MERRIMAN AND EMILY M. MERRIMAN.

Equity—Reformation of deed—Action upon covenants—Res judicata.

1. A grantor was induced to execute a warranty deed of an entire lot of land, a portion of which she had previously conveyed to a third party, of which fact the grantee was fully advised, by the statement of the scrivener, made in the presence of the grantee, that including the entire lot in the deed would make no difference, as the matter was fully understood by both parties, and that the covenants of warranty would only apply to the portion of the lot owned by the grantor. The grantee attempted to take possession of the entire lot, but, finding that the prior deed was on record at the time of the execution of the second deed, sued the grantor upon the covenants of warranty, in which suit the whole matter was litigated, and submitted to the jury, who were instructed that they must find a verdict for the plaintiff in any event, and, if satisfied that the defendant's contention as to the circumstances under which the deed was executed was sustained by the testimony, they must assess the plaintiff's damages at the sum of one dollar (being the sum tendered by the defendant, and paid into court, as payment in full for all damages sustained by the plaintiff by reason of the alleged breach of covenant), but, if they found against the defendant in that behalf, they should assess plaintiff's damages in proportion as the value of the part of the lot primarily sold bore to the value of the entire lot, being the purchase price agreed to be paid by the plaintiff. The jury found a verdict for $95 in favor of the plaintiff, upon which judgment was entered, with costs, from which the defendant did not appeal, but filed a bill setting up the same state of facts attempted to be proved in the suit at law, and praying for the reformation of the deed, and that the collection of the judgment be enjoined. The defendant interposed a plea setting up the proceedings and judgment in the suit at law, which were claimed to be *res judicata* of the issues tendered by the bill of complaint; which plea was held sufficient to bar the relief prayed for, and, the complainant declining to take issue upon the plea, the bill was dismissed. And in reversing said decree the Court hold:

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a—That the claim set up in the plea that complainant's case had been tried before a court of law, and found adversely to the complainant, does not meet the case made by the bill.

b—That, if complainant's contention is correct as stated in the bill, the plaintiff was not entitled to any judgment whatever in the action at law, and the complainant should not have been subjected to the costs following such judgment; that, if the deed had expressed what complainant claims was the true intent and agreement of the parties, plaintiff would not have obtained a judgment even for nominal damages; and therefore complainant is entitled to maintain her bill, and, if her claim is substantiated on the hearing, she will be entitled to the relief prayed for.

2. The following general propositions are summarized from the opinion of Chief Justice CHAMPLIN:

a—In this State the distinction between law and equity, as applied to remedies, has been maintained. The courts of law have no jurisdiction to reform written instruments, it being vested exclusively in the equity courts.

b—It has long been settled that if, by reason of fraud, mistake, accident, or surprise, an instrument does not express the true intent and meaning of the parties, equity will upon satisfactory evidence reform it; citing *Gillespie v. Moon*, 2 Johns. Ch. 585.

c—The rules of evidence at law and in equity are the same, but when the question is not *what* the terms of the written contract are, but whether the contract as written was entered into or whether it was obtained by fraud, or is founded in surprise, accident, or mistake, these subjects of inquiry are open to parol testimony, irrespective of what the writing contains.

Appeal from Kent. (Grove, J.) Argued June 5, 1891. Decided July 18, 1891.

Bill to reform a deed, and enjoin the collection of a judgment recovered in an action for breach of its covenants of title. Complainant appeals. Decree dismissing bill reversed, and case remanded with leave to defendants to answer. The facts are stated in the opinion.

John M. Mathewson, for complainant.

M. H. Walker, for defendants, contended:

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1. The point to be determined in this case is not, as stated in appellant's brief, "whether a suit for damages on the breach of covenants contained in a deed will bar a suit in equity to reform the deed," but where a suit at law is brought for damages on the breach of covenants contained in a deed, in which suit the defendant (grantor in said deed) claims that a mistake was made in the drafting of the deed, and that said deed was not intended to convey, nor said covenants to apply to, the whole of the property described therein, but only to a part thereof, and that the balance of said property was included by mistake, and that said deed did not represent the real bargain and true intent of the parties, and insists upon the right, and is permitted to and does go fully into the trial of that question and issue, and the same is submitted to the jury as the sole and controlling question in the case, and is determined adversely to the defendant (grantor), whether such suit, verdict, and judgment thereon, and the determination of such issue, is a bar to a subsequent suit in equity by the grantor, based upon the same facts and claim of mistake, praying for a reformation of the deed, and the enjoining of the collection of such judgment.

2. A judgment at law is conclusive upon the same question in equity; citing Freem. Judg. § 248; Herman, Est. §§ 399, 402; *Pearce v. Gray*, 2 Younge & C. 322; *Smith v. McIver*, 9 Wheat. 532.

3. Where an equitable defense is presented which might have been made the subject of an original bill, the defendant cannot, after a verdict in favor of plaintiff, present the same matters in equity as grounds for affirmative relief against plaintiff; citing Freem. Judg. § 281; Herm. Est. § 399; *Terrell v. Higgs*, 1 DeG. & J. 388; *Arnold v. Allinor*, 15 Grant, Ch. 375; *Smith v. McIver*, 9 Wheat. 532; and the discovery of new evidence, not in the power of the party to produce at the former trial, forms no exception to the rule in relation to estoppels, whether the second action is at law or in equity; citing Freem. Judg. § 249; Herm. Est. § 399; *Kilheffer v. Herr*, 17 Serg. & R. 319.

4. If a party at law has an equitable defense, and chooses to make it at law, he is considered as electing to defend at law, and is bound to present every defense he can; citing Frem. Judg. § 501; *Hendrick v. Hinckley*, 17 How. 443; *Crim v. Handley*, 94 U. S. 652; and where a party elects to sue upon a written contract as executed, and the action proceeds to trial and judgment after final submission, he is bound by his election, and cannot thereafter bring an action to reform the contract; citing *Thomas v. Joslin*, 36 Minn. 1; nor can a complainant

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recover money by a bill in equity which he failed to recover in an action at law, where jurisdiction of the claim exists both at law and in equity; citing *Lane v. Lane*, 80 Me. 570.

5. As to when a judgment is conclusive, counsel cited Freem. Judg. §§ 252-254, 259; *Bigelow v. Winsor*, 1 Gray, 299; *Spencer v. Dearth*, 43 Vt. 93; *Betts v. Starr*, 5 Conn. 550; *Doty v. Brown*, 4 N. Y. 71; *Walker v. Chase*, 53 Me. 258.

6. The successful prosecution of an action for a breach of warranty of a contract necessarily affirms for all future actions the making of the contract; citing *Barker v. Cleveland*, 19 Mich. 230; Freem. Judg. § 312.

7. Generally courts of equity will not assume jurisdiction to retry cases which have already been disposed of in courts of law upon the very point made by the bill; citing *Miller v. Morse*, 23 Mich. 365; *Spoon v. Baxter*, 31 Id. 279; *Wilson v. Coolidge*, 42 Id. 112; *Gray v. Barton*, 62 Id. 186.

CHAMPLIN, C. J. The bill of complaint is filed in this case to reform a certain deed of real estate described as "the entire of lot two, block two, Snell's addition to the village of Lowell, as of record," so that the same shall read, "all of village lot number two of block two, according to Caroline Snell's recorded addition to the village of Lowell, excepting that portion heretofore sold by the first party hereto unto one Ann Loughlin by deed bearing date the tenth day of August, 1877;" and also to restrain the defendants from prosecuting a suit, or any suit, against the complainant for breach of covenant of warranty of seisin on account of that portion of lot two conveyed to Ann Loughlin prior to the deed from said Susan A. Bush to them.

The bill of complaint sets up that prior to the 10th day of August, 1877, complainant was the owner of lot 2, block 2, above mentioned, and on that day sold a portion thereof, and conveyed the same, to one Ann Loughlin; that on the 20th day of February, 1888, she sold said lot 2, block 2, except the portion previously sold to Ann Loughlin, to the defendant David P. Merri-

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man; that previous to her sale to him he was shown that portion of the lot which had been previously conveyed, and which premises were surrounded by a fence, and that he was informed where the lines of the real estate were which was intended to be sold to him, and that the other portion of lot 2 had previously been sold to Ann Loughlin; that the price agreed upon for that portion of which the title remained in the complainant was $300; that after agreeing upon the price Merriman and complainant met at the office of Sylvester P. Hicks in the village of Lowell, for the purpose of consummating such bargain, and making a deed of that portion of said lot 2 that complainant then owned, and that she had bargained to sell, and to make delivery of the deed of the same; that Hicks had prepared a deed before complainant went there, joining the complainant and her husband as grantors, and he commenced to read the deed which he had drawn; that, when he came to that portion, the complainant objected to her husband being named as one of the grantors, as he did not own any interest in the land, whereupon Hicks drafted a new deed, and by the request of Merriman the deed was made jointly to David P. Merriman and Emily M. Merriman as grantees; that after the deed had been drafted it was read to the complainant in the presence of David P. Merriman, whereupon the complainant then and there objected to executing such deed on account of the description of the property, to wit, "the entire of lot two, block two, Snell's addition to the village of Lowell, as of record;" that she then stated to said Hicks and David P. Merriman that she did not own all of said lot 2; that she had not bargained all of it; that she had previously sold a portion of said lot to Ann Loughlin, and that Merriman understood it; that Mr. Hicks then stated that the abstract did not show she had sold any of it; that com-

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plainant then informed them that the abstract was wrong; that she had sold a portion to Ann Loughlin, and she had bargained to Merriman what was left; whereupon Mr. Hicks, in the presence of said Merriman, stated that it would make no difference, as both parties understood the matter fully; that the Merrimans could only hold what was left; that with that understanding, that the Merrimans could only hold her responsible for such part of lot 2 as she then owned, she consented to and did sign and deliver to said David P. Merriman a warranty deed, a copy of which is appended to the bill, and which the defendants afterwards, on the 23d day of February, 1888, caused to be recorded in the office of the register of deeds of Kent county, in Liber 185 of deeds at page 20.

Complainant further alleges that, shortly after the delivery of the deed, the defendants took actual possession of the premises, and have ever since been in possession thereof, and occupied the same as a home; and that, prior to the execution and delivery of the deed, the actual location and extent of the premises intended to be conveyed were ascertained by view and inspection thereof, and were understood correctly and alike by the parties to said deed to be all of lot 2 of block 2 in the village of Lowell, Kent county, State of Michigan, according to Caroline Snell's addition to said village, except that portion of said lot 2 that had been deeded to Ann Loughlin, and which portion was then fenced in as aforesaid with her other land, and was then, and is now, and has ever since been, in her possession. She then charges that by mistake of said parties the description in said deed is so drawn that it includes not only the premises intended to be conveyed to the defendants by the complainant, but also the piece of land sold and conveyed to Ann Loughlin as aforesaid; that the defend-

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ants well knew that complainant only intended to convey that part of lot 2 which she then owned, and not that part inclosed by Ann Loughlin's fence; and she believed that said description actually written in said deed only conveyed the entire of what she then owned of said land, and no more. She further charges that soon after the execution of the deed the defendants moved into the house on the lot, commenced keeping house, and soon after that obtained a surveyor, and claimed to have established the boundary lines of said lot 2, and then for the first time they set up and claimed to own the whole of said lot 2, and they commenced to tear down the line fence between the land conveyed to Ann Loughlin and the land sold to defendants; whereupon Ann Loughlin forbade them from tearing down the fence, and showed them her deed, which deed had then been on record six years or thereabouts; whereupon the defendants then set up for the first time to the complainant the claim that she had sold and deeded to them the whole of lot 2; that up to this time the complainant supposed and believed the description to be correct, and a true description of the premises owned by her, and intended to be conveyed by her to said defendants.

Complainant further charges that the claim set up on the part of the defendants, after having obtained possession of the premises, is untrue, wicked, and fraudulent, and by means whereof they are trying to obtain an undue advantage of her by obtaining from her pay for that which they never purchased and paid for; that they now have and enjoy all that they purchased, and all that they paid for, and are seeking to take an undue advantage of the language used in the deed to extort a large sum of money from her; that on or about the 1st day of June, 1888, they commenced a suit against her before a justice of the peace, based upon the covenants in her deed; that

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she put in a plea of the general issue, with a notice setting up substantially that Merriman examined the property and was shown the lines before he purchased, and was informed that a part of lot 2 had been sold to Ann Loughlin, and then belonged to her, and was in her possession, and that she (Susan A. Bush) was not the owner of the whole of said lot, but was the owner still of the part that remained unsold, and that she so informed Hicks, and that it was a mistake and fraud in Hicks to insert the entire of lot 2; that she never authorized any person to make a deed of the whole lot, and never bargained or sold the whole of lot 2 to the defendants; and that it was understood the word "entire," used in that deed, did not mean all of lot 2, but all that remained unsold, and that plaintiffs accepted the delivery of the deed with that understanding; that the deed to Ann Loughlin was on record before the purchase by Merriman, and that it was an imposition and fraud for the Merrimans to set up a claim that she owed them anything on the sale of said land; that they had all the land they purchased or contemplated getting by the deed; and that they accepted it with the full knowledge that Mrs. Loughlin owned the strip hereinbefore described. She also set up that the title of the land would come in question, and the cause was certified to the circuit court for the county of Kent, and was there tried before a jury, and the plaintiffs recovered a judgment for damages, on account of a breach of covenant, for more than $100, besides costs taxed at $57; and afterwards, upon her motion, a new trial was granted, and was had, when the plaintiffs again recovered a judgment for $95, and costs taxed at $110.40. She further avers that they threaten to enfore the collection of the same by execution and sale of her property.

The defendants, David P. Merriman and Emily M. Merriman, interposed a plea to the bill of complaint in

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which they set up with sufficient particularity the proceedings before the justice and in the circuit court, and the charge of the circuit judge to the jury; and by it defendants aver that the same issues set up in the complainant's bill of complaint were tried and determined in the suit at law, and that it is *res judicata.*

The plea interposed by the defendants was brought on for argument, and was held by the court to be sufficient to bar the complainant of any relief in this suit; and, the complainant declining to take issue upon the plea, the court entered a decree dismissing complainant's bill of complaint; and the question presented to us is whether or not the trial of the suit at law is a bar to a proceeding in a court of equity, by the complainant to reform the deed.

In this State the distinction between law and equity, as applied to remedies, has been kept up. The courts of law have no jurisdiction to reform written agreements. This jurisdiction is exclusively vested in courts of equity, and it has long been settled that if, by reason of fraud, mistake, accident, or surprise, an instrument does not express the true intent and meaning of the parties, equity will upon satisfactory evidence reform it. It was said by Chancellor Kent in *Gillespie v. Moon,* 2 Johns. Ch. 585, that—

"The written instrument, in contemplation of law, contains the true agreement of the parties, and the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol; but equity has a broader jurisdiction, and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself."

The rules of evidence at law and equity are the same, but when the question is not what the terms of the written contract are, but whether the contract as written

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was entered into or whether it was obtained by fraud, or is founded in surprise, accident, or mistake, these subjects of inquiry are open to parol testimony, irrespective of what the writing contains. The case of *Bradford v. Bank*, 13 How. 57, is an authority for holding that where there was no agreement to sell on one side, nor to buy on the other, and the contract was only to sell, but the mistake, which was of a given fact, namely, as to want of title to one parcel of land agreed to be conveyed, had given effect to the instrument far beyond the agreement and real understanding of the parties, parol evidence was admissible to show what the real contract of the parties was; and that such a case falls within the principles of equity in granting relief against contracts entered into by mistake and misapprehension of the facts, and where the enforcement of it would enable one of the party to obtain a most unconscionable advantage over the other.

It appears from the bill that the mistake did not consist in including the description of the whole lot in the deed, for that fact was known and understood when complainant executed it; but it consists in what the scrivener told her as to its legal effect, and her liability or responsibility thereunder. If the draughtsman was honest in his statements, and there was no collusion or fraudulent design in so procuring the deed to be executed with such description on the part of the grantees, then he made a mistake of law in so advising Mrs. Bush; but Mrs. Bush relied upon the fact, as it was stated to her, that she would incur no liability in executing the deed as presented, and was induced by that fact to execute it. In either view, it was such a mistake as equity would relieve against. If the advice given by the draughtsman was intended to mislead Mrs. Bush, then it is clear that the execution of the instrument was induced

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by the false and mistaken statement of its legal effect or operation, and the grantees should not be allowed to take advantage of the error which they have contributed to produce. It is accordingly established that chancery may afford relief under these circumstances, whether the misstatement was innocent or prompted by a wish to deceive, and although the complainant was acquainted with the contents of the instrument. 2 White & T. Lead. Cas. (4th Amer. ed.) pt. 1, p. 988.

The bill in this case, however, shows a stronger ground for relief. It is stated that soon after the deed was executed the defendants procured a surveyor to run the lines of their lot, claiming the whole of lot 2; that they attempted to tear down the line fence which separated the land intended to be conveyed to them from that of Mrs. Loughlin; and upon her exhibiting to them her deed, with the certificate of the register showing that it had been recorded a long time before they purchased, they desisted, and immediately commenced suit against their grantor upon the covenant of seisin contained in the deed. These facts, taken in connection with what occurred upon the execution of the deed in Mr. Hicks' office, wherein he told complainant that, if she had conveyed the premises to Mrs. Loughlin, it did not appear upon the abstract, lead us most strongly to the inference that Merriman was attempting in that transaction to obtain undue and unconscionable advantage, and to lay claim to the whole of the lot as an innocent purchaser, basing it upon the idea that Mrs. Loughlin's deed was not on record. But equity will interfere to protect the rights of parties to control the legal effect and operation of covenants obtained as this one was, when they are sought to be enforced by the party who has obtained them under the representation that they would be of no binding force or effect. And such action upon the part

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of Merriman was a fraud upon the complainant, and, if she is enabled to substantiate the facts alleged in her bill by sufficient evidence, the court will not hesitate to reform the deed, and make it to correspond with the actual agreement and intent of the parties. *Taylor v. Gilman*, 25 Vt. 413.

The claim set up in the plea that this case has been tried before a court of law, and found adversely to the complainant, does not meet the case made by the bill. The court in that case at law charged the jury that they must find a verdict for the plaintiffs in the suit at all events, and, if they were satisfied that the defendant's testimony with reference to the transaction was correct, then they must assess damages at the merely nominal sum of one dollar, but, if otherwise, they should assess the damages in proportion as the value of the part which had been previously sold to Mrs. Loughlin bore to the whole lot, valued at $300, the purchase price agreed to be paid by Merriman.[1] Now, if the complainant's contention is the correct one, as stated in her bill of complaint, the plaintiffs in the action at law were not entitled to any judgment whatever, either nominal or otherwise, and she should not have been subjected to the costs following upon such judgment. If the deed had expressed what she claims was the true intent of the parties and the agreement between them, it would have been impossible for the plaintiffs in the suit at law to obtain a judgment against her even for a nominal damage. Therefore we think that she is entitled to present her bill in a court of equity, and ask to have the deed reformed.

We think that the plea tendered was insufficient, and

[1] The defendant had tendered the sum of one dollar, and kept the tender good by paying the money into court, as payment in full of all the damages plaintiffs had sustained by reason of the alleged breach of covenant, which facts the jury were instructed were undisputed in the case.

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that the decree must be reversed, and the cause remanded to the court below, with leave to defendants to answer within 20 days from the time of notice of the filing of the transcript in that court. The complainant may recover the costs of this Court; the costs of the court below to abide the event.

The other Justices concurred.

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JACOB G. SUMMERS v. GEORGE N. WAGNER AND LEVI B. WAGNER.

Sale—Passing of title—Evidence.

Evidence of a parol agreement made after the execution of a written contract for the purchase of the cut of a shingle-mill, and for the passing of title when the shingles were reported and paid for, by which the vendor was to ship shingles not so reported and paid for, the title to which was to pass on their shipment, is admissible, and the vendor can recover for shingles shipped under such latter agreement, but not for shingles loaded in a car and destroyed by fire prior to their shipment.

Error to Montcalm. (Smith, J.) Argued June 5, 1891. Decided July 28, 1891.

Assumpsit. Defendants bring error. Judgment entered in Supreme Court for a portion of the claim for which plaintiff had judgment below. The facts are stated in the opinion.

Drury & Wolcott, for appellants, contended:

1. The written contract contained a specific provision as to when title to the shingles was to pass, and is the only evidence of the agreement of the parties on that point; citing *Adair v.*

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Adair, 5 Mich. 204; *Cline v. Hubbard*, 31 Id. 237; *Skeels v. Starrett*, 57 Id. 350.

George S. Steere, for plaintiff.

MORSE, J. This cause was tried before Hon. V. H. Smith, judge of the Montcalm circuit court, without a jury, who rendered judgment for the plaintiff in the sum of $353.25.

The facts as found by the circuit judge are substantially as follows: February 5, 1889, the plaintiff and defendants entered into the following written contract:

"SHERIDAN, MICH., February 5, 1889.

"I hereby sell to G. N. Wagner & Bro., Grand Rapids, Mich., the cut of Pitcher's mill from February 1 to July 1, 1889, white pine shingles, to be 5 butts two and a quarter and 10 inches long; the XXXX to be strictly clear and free from all imperfections, and the 6-inch C. B. strictly clear butts. No other grades to be taken out. All to be free from stain, dote, and rot, and guaranteed to be good, merchantable shingles. Price, XXXX $2.75 per M., and $1.50 per M. for C. B. Shingles to be piled at railroad, and branded with G. N. Wagner & Bro.'s brand at mill as made, with brand furnished by G. N. Wagner & Bro. All shingles reported on the 1st and 15th of each month to be paid for not later than the 5th and 20th, and when paid for title to pass to G. N. Wagner & Bro., to be loaded on car free of expense to G. N. Wagner & Bro.

"J. G. SUMMERS. [Seal.]

"We agree to fill our part of the above contract.

"G. N. WAGNER & BRO."

Indorsed on the contract is the following:

"The within contract is hereby extended to Nov. 1, 1889, with same terms and conditions.

"G. N. WAGNER & BRO.
"J. G. SUMMERS."

On the 2d or 3d day of July, 1889, one of the defendants was at the mill, and the extension above was agreed to, and a few days later signed by the parties.

When the original contract was made, the mill was

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some miles from Sheridan, to which village it was moved in May, 1889. While the mill was in its first position, the shingles were drawn to Sheridan, and piled opposite the depot, at a place called the "dock," situated about 20 rods from the mill after it was located at Sheridan. After the mill was moved, the shingles were not piled at the dock, but along the railroad track, and nearer the mill. When one of the defendants was at the mill in July, 1889, he saw these shingles. There were but a few in the mill. All the shingles then cut were counted and paid for. Plaintiff agreed to move the shingles then in the mill, and pile them with the others. This was done soon after the defendant was there. The defendant at this time said the shingles were piled all right, and at the right distance from the mill, and it was agreed they should remain there until ordered shipped, and that the shingles cut after that date should be piled along the railroad track near the others, and they were afterwards so piled. July 15, 1889, plaintiff reported the shingles cut and piled to that date, and was paid in full for them. After that date the plaintiff continued cutting shingles and piling them in this place, until the mill was destroyed by fire on the morning of July 27, 1889.

When one of the defendants was at the mill in July he directed that the shingles be shipped from those piled nearest to the mill. The defendants would send written orders to plaintiff for the shipment of the shingles, which would be loaded and shipped in compliance with such orders. On the 23d of July, 1889, plaintiff received the following order from defendants:

"GRAND RAPIDS, MICH., July 22, 1889.
"Order No. 543.

"To J. G. SUMMERS,
"Sheridan, Mich.

"*Dear Sir:* Please load for New Haven, Ct., and con-

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sign to F. W. Stone, New Haven, Ct., one car 10-inch XXXX pine. Hurry up the orders sent you some time ago, and be sure and brand every bundle. Order car at once, and load promptly. Be careful in loading to keep your tally correct. Send invoice promptly, and with it the number of this order. Fasten firmly both doors of car before it leaves your siding. Do not load any broken bunches of shingles.

"Respectfully, G. N. WAGNER & BRO."

When this order was received plaintiff loaded into a car, on July 25, 100,000 XXXX shingles, which had been cut after July 15, and had not been reported or paid for, but which had been piled where defendant Levi B. Wagner directed they should be piled; and he took them from the place where said defendant had told him to ship from on July 2 or 3, as orders came for the shingles, —that is, he was told to and did load the cars from the shingles nearest the mill. This car loaded with XXXX shingles left Sheridan before the mill burned, and on the 25th day of July, 1889.

Pursuant to another order received from defendants, the plaintiff had on the 26th day of July, 1889, partly loaded another car with shingles,—that is, he had placed in the car, July 26, 43,000 C. B.'s, and 5,000 XXXX's, and the car was standing on the side track the night of July 26, 1889. The shingles in this car had been taken from those nearest the mill, as before directed by defendant Levi B. Wagner, and from the place where it had been agreed they should be piled; but they were all shingles that had been cut after July 15, and had not been reported or paid for when loaded.

On the morning of July 27, 1889, the mill burned, burning the car partly loaded, with the shingles therein, and also burning 32¼ thousand of C. B.'s, not loaded on car, and cut after July 15, and not reported or paid for, but piled where directed by defendants. At the time of

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the fire there was piled about the mill 17¼ thousand XXXX and 36¾ thousand C. B. shingles, cut before July 2, and reported and paid for; and there was on hand in all of shingles cut after July 2, and reported and paid for, 80½ thousand XXXX and 32½ thousand C. B. shingles. These cut after July 2 above mentioned were burned.

It was the intent of the plaintiff and defendants that the car-load of XXXX shingles shipped July 25, 1889, should belong to and be the property of the defendants from the time they were loaded into the car for shipment, and it was also their intent that the shingles loaded into the car burned should belong to and be the property of the defendants as fast as loaded into the car, and the title to the shingles in both car-loads passed to the defendants before the fire.

From these facts the circuit judge found as a matter of law that the plaintiff was entitled to a judgment for the value of the shingles at the contract price, with interest at 6 per cent.

Some objections were made to the admission of testimony, upon the overruling of which errors are assigned; but we are satisfied that there were no errors committed in this respect. It was competent to show that plaintiff and defendants agreed, after the execution of the written agreement, that shingles nearest the mill, and not reported and paid for, might be shipped, and the title pass upon such shipment; and, when such agreement had been carried into effect, as in the case of the car-load shipped under direction of the defendants in their order of July 22, 1889, the plaintiff would be entitled to recover the contract price of the shingles so shipped. The plaintiff was clearly entitled to judgment for the value of this car-load.

As to the shingles loaded into the car which was not fully loaded, and which was burned, with its contents,

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there is more difficulty in determining to whom the shingles belonged at the time of the fire. It is contended on the part of the defendants that there was no evidence whatever tending to show that it was the intent of the parties under any agreement, oral or written, that the title should pass to the shingles as soon as they were placed in the car, and before actual shipment. There was no direct evidence that the parties agreed that the title should pass as soon as shingles were put into the cars. It is true that the plaintiff testified, and the court so found, that one of the defendants directed the plaintiff to ship from the piles nearest to the mill; and under this direction it necessarily followed that shingles would be shipped that had not been reported or paid for. It would be fair, therefore, to infer that the intent of the parties was that, when defendants directed a car to be sent to third parties, and the plaintiff shipped them pursuant to such direction, thereby relinquishing his control over them, the title should pass out of the plaintiff upon such shipment. But there was no express agreement about it, and we do not think it a fair presumption that the parties intended that the title should leave the plaintiff as long as the shingles remained under his disposition and control. Until the car was loaded and shipped, the shingles were in the hands of the plaintiff, and the title remained in him. His express written agreement was that the title should not pass to defendants to the shingles until paid for, and the agreement to ship before they were paid for did not change the title until they actually passed beyond his control.

Judgment was entered in the court below for the shingles in both cars at the contract price, with interest at 6 per cent. There was error in including in this judgment the shingles in the burned car. Judgment will be entered in this Court for the plaintiff for the

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shingles shipped in the first car, at the value of $275, with interest at 6 per cent. upon that sum from the date of shipment, July 25, 1889.

The defendants will recover costs of this Court.

The other Justices concurred.

MOSES MEYER v. A. SCHUYLER MONTGOMERY, JOSEPH B. CHAMPAGNE, AND KATHERINE HETZ.

[See 74 Mich. 359, 365.]

Partnership—Agency—Logging contract—Recoupment.

1. A provision in copartnership articles for the appointment of the husband of one of the partners as her agent, with like powers as she might exercise were the appointment not made, and that the husband shall devote his time and services to the business of the firm, in lieu of those of his wife, clothes him with the general authority of a partner.
2. In the absence of any express agreement, a logging contractor is not liable for costs incurred by the log-owners in defending against an illegal claim of a lien under the log-lien act.

Error to Muskegon. (Dickerman, J.) Argued June 10, 1891. Decided July 28, 1891.

Assumpsit. Defendants bring error. Affirmed. The facts are stated in the opinion.

DeLong & O'Hara, for appellants, cited no authorities.

Turner, Turner & Turner, for plaintiff, contended for the doctrine of the opinion.

MCGRATH, J. Defendants were copartners in the bus-

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iness of purchasing timber lands, logs, and other forest products, and in the manufacture and sale of lumber, shingles, lath, etc.

Plaintiff claimed to have been employed by Jacob Hetz, the husband of the defendant Katherine Hetz, on behalf of the firm, in the fall of 1887, in hauling logs, cutting roads, making skidways, and skidding logs; that Hetz represented that these logs belonged to, and that the work was done for, defendants. Plaintiff claimed that the work done, at prices agreed upon, amounted to $1,175; that he had been paid by defendants about $500; that he had allowed for teams furnished to him by defendants for said work the sum of $400; and judgment was rendered for him for $326.28, being about the balance, with interest.

The defendants claimed that certain of this work for which plaintiff had charged was done for Hetz individually, and not for the firm; that the firm had employed plaintiff to do certain work, but part of which had been done, and that they were entitled to recoup for damages sustained by reason of the non-performance of the work left undone; that defendants were entitled to a credit for over $500 for the teams furnished by them to plaintiff; that, during the progress of the work by plaintiff, several suits were commenced against plaintiff, by persons claiming labor liens, and defendants' logs were attached, by reason whereof defendants were put to great expense in defending their property; that two of said suits were carried to this Court; and in all of said suits the defendants in the present case succeeded.

The record presents 21 assignments of error, 14 of which depend upon the single question of the authority of Jacob Hetz to act for defendants. If Hetz had authority to employ plaintiff, defendants were bound by the hiring, and plaintiff was not liable for damages for dis-

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continuing work, when directed to do so by Hetz. This question was fairly submitted to the jury, but defendants contend that there was no testimony tending to establish his agency. Defendants' articles of copartnership were introduced, and contain the following provisions:

"The said Katherine Hetz is hereby authorized to appoint Jacob Hetz as her agent, who shall have and exercise, with reference to the business and affairs of said firm, powers which, by this article, the said Katherine Hetz might and could exercise were said appointment not made; and it is understood and agreed that said appointment shall be made, and that said Jacob Hetz shall devote his time and services to the business of said firm, in lieu of the time and services of said Katherine Hetz."

The articles contain certain restrictions upon the powers of the individual members, prohibiting certain transactions, but do not prohibit transactions of this nature. The firm paid to the plaintiff all of the moneys received by him in the course of the work, honored all the orders drawn upon them, and, through Hetz, furnished teams for the work. There was abundant testimony tending to establish the agency of Jacob Hetz; indeed, he was clothed by the articles with the general authority of a partner.

The court instructed the jury that defendants could not set off or recoup their expenses in defending the lien suits, if the failure of plaintiff to pay his men was due to the fault of defendants, or grew out of the fact that defendants failed to pay plaintiff. There was no error in this instruction. In the absence of any express agreement, plaintiff was not liable for costs incurred by defendants in defending their own property from a claim of lien made by a third party, to which such third party had no legal right.

Several errors are assigned upon exceptions taken to

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the admission of testimony, but the rulings of the court were correct.

The judgment is affirmed, with costs.

The other Justices concurred.

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WILLIAM G. PALMER v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Master and servant—Negligence—Injury to employé—Vice-principal—Evidence.

1. The question of the negligence of a railroad company in directing, by its assistant road-master, its sectionmen to load steel rails lying along the track onto moving flat-cars, should have been submitted to the jury, under the circumstances of this case.
2. It was error to refuse to permit the plaintiff to show how many of the sectionmen thus employed had had no experience in that particular kind of work, the severity of the work, whether any of the men gave out before the accident to plaintiff, whether plaintiff could see the rail before it hit him, and that loading the rails onto moving cars was more dangerous than upon stationary cars.

Error to Cass. (O'Hara, J.) Argued June 10 and 11, 1891. Decided July 28, 1891.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Howell & Carr, for appellant, contended:

1. Plaintiff was under obligations to obey the orders of his superiors, and he assumed no risks except those which properly pertained to his employment, and those which he understandingly assented to; citing *Railway Co. v. Bayfield*, 37 Mich. 205; *Swoboda v. Ward*, 40 Id. 424, 425; and he had the right

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to assume that his danger was not increased by the *manner* in which the work was ordered done; citing *Iron Co. v. Erickson*, 39 Mich. 492; *James v. Mining Co.*, 55 Id. 336.

2. In all cases when the danger can be readily guarded against, the employer is in duty bound to protect his employé, and, if he does not, his failure is at his peril; citing *Hathaway v. Railroad Co.*, 51 Mich. 258; *Cook v. Railway Co.*, 34 Minn. 45.

3. The well-established rule that the employer must furnish a safe place and tools for the work (*Smith v. Car Works*, 60 Mich. 502; *Swoboda v. Ward*, 40 Id. 420) must, of necessity, have reference to the manner in which the work is performed, and, when a proper place and tools are furnished for the performance of the work in a certain manner, the adoption of another manner, which renders the place or appliances unsafe, is actionable negligence. Every decided case which deals with the question of suitableness of means recognizes the necessity of methods suitable to such means; citing *Johnson v. Water Co.*, 71 Wis. 553; *Railroad Co. v. Barber*, 5 Ohio St. 542; *Booth v. Railroad Co.*, 73 N. Y. 38; *Hewitt v. Railroad Co.*, 67 Mich. 65; *Marshall v. Furniture Co.*, Id. 167; and the laws requiring railroad companies to make suitable rules for the protection of their employés (*Railway Co. v. Taylor*, 69 Ill. 461; *Railway Co. v. Powers*, 74 Id. 341; *Abel v. Canal Co.*, 103 N. Y. 581; *Railway Co. v. Lavalley*, 36 Ohio St. 221; Wood, Mast. & S. § 403; 1 Addison, Torts, 605), and making them liable for the enforcement of such rules (*Railway Co. v. Bayfield*, 37 Mich. 205; *Madden v. Railway Co.*, 57 Amer. Rep. 695), require a supervision of the company over the manner in which its work is being done. Such rules can relate only to the manner of doing work, and, if they adopt or permit a method which causes an accident, they are liable; citing *Hunn v. Railroad Co.*, 78 Mich. 515; *McGovern v. Railroad Co.*, 123 N. Y. 280; *Johnson v. Spear*, 76 Mich. 139; *Kean v. Rolling Mills*, 66 Id. 277; *Eddy v. Mining Co.*, 81 Id. 548.

4. The manner in which the defendant required this work to be done made it impossible to provide against the danger it created, and impossible to give the servant sufficient notice of the approach of danger to enable him to escape. The law is well settled that the master must make the work safe (*Paulmier v. Railroad Co.*, 34 N. J. Law, 15; *Nadau v. Lumber Co.*, 76 Wis. 120; *Swoboda v. Ward*, 40 Mich. 420), and give the servant notice of dangers (*Erickson v. Railroad Co.*, 41 Minn. 500), and if, through the master's management, the warning becomes impossible or useless, and the work unnecessarily unsafe, why should he be released?

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5. It is also the master's duty to instruct the servant and qualify him for the work, and the instruction must continue to completion; citing *Brennan v. Gordon*, 118 N. Y 489; *Nadau v. Lumber Co.*, 76 Wis. 120; *Parkhurst v. Johnson*, 50 Mich. 70.
6. When the servant is doing a special act under the express direction of the master, he does not assume risks pertaining to the employment, but only such as are patent and understandingly appreciated by him; citing *Railway Co. v. Bayfield*, 87 Mich. 205; *Swoboda v. Ward*, 40 Id. 424, 425; *Iron Co. v. Erickson*, 89 Id. 492; *Smith v. Car Works*, 60 Id. 501; *Taylor v. Railroad Co.*, 16 Am. St. Rep. 872, 877; *Myers v. Iron Co.*, 150 Mass. 125; *Snow v. Railroad Co.*, 8 Allen, 441.

Edwards & Stewart, for defendant, contended:

1. Plaintiff assumed the ordinary risks of the service he entered upon; citing *Davis v. Railroad Co.*, 20 Mich. 105; *Swoboda v. Ward*, 40 Id. 420; *Mining Co. v. Kitts*, 42 Id. 34; *Railroad Co. v. Smithson*, 45 Id. 212; *Hathaway v. Railroad Co.*, 51 Id. 253; *Smith v. Car Works*, 60 Id. 501; *Kean v. Rolling Mills*, Id. 277; *Balle v. Leather Co.*, 78 Id. 158; *Melzer v. Car Co.*, 76 Id. 94; *Fisher v. Railway Co.*, 77 Id. 546.
2. As fellow-servants of plaintiff, all the employés at the time of the accident, employed in the same general business of removing the rails, must be classed; and this includes the gangs of men who lifted and loaded the rails, the engineer, fireman, conductor, and the assistant road-master; citing Cooley, Torts, 545, 551; *Connelly v. Railway Co.*, 38 Minn. 80; *Harrison v. Railroad Co.*, 79 Mich. 409; and defendant is not liable for Wahl's negligence while in the same general employment with plaintiff; citing *Railroad Co. v. Leahey*, 10 Mich. 198; *Davis v. Railroad Co.*, 20 Id. 105; *Railroad Co. v. Dolan*, 32 Id. 510; *Henry v. Railway Co.*, 49 Id. 495; *Hewitt v. Railroad Co.*, 67 Id. 61; *Mining Co. v. Kitts*, 42 Id. 34.

LONG, J. This action was brought in the circuit court for the county of Cass, and a trial was had before the court and jury, and at the close of the testimony the court directed a verdict in favor of the defendant.

The claim stated in the declaration substantially is that the plaintiff who was a strong and active man of 29 years of age, entered into the service of the defendant on September 10, 1889, as a laborer, at $1 per day, working in and about repairing tracks of defendant, on

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one of the sections, under the direction of the section boss, and performing such duties as are usually performed by section hands; that on the 11th day of September, 1889, and when he had been in the employ of defendant but one day, he was, together with other section laborers, wrongfully and negligently ordered to load a large number of steel rails, lying along either side of the track of the defendant, upon certain flat-cars, while the said cars were in motion; that said work was being done by a large number of sectionmen, about 30, composing these section gangs, and the crew of the train upon which the rails were being loaded, the whole force so engaged being under the direction and control of defendant's assistant road-master, one Patrick Wahl, who was by the defendant authorized and directed to order, direct, and control such work, and who, in accordance therewith, ordered said train to be kept in motion while the rails were being loaded by the plaintiff and his fellow-workmen; that it was necessary, in the performance of the work in that manner, that the men should, after heaving each rail upon the car nearest them, run forward with the train, but at a greater speed, to the next rail, so as to have it in the air ready to heave when the car reached them; that the plaintiff was stationed near the end of the line, and in running to the next rail was near the head of the line, that is, he was the third man from the head in the line in going forward, and was therefore obliged to run fast enough to keep his place, and not delay those behind him, and so was wholly unable to watch the rails upon the car to see if they were safely lodged, and to see such rails if they should fall; that at the time and place aforesaid, while the plaintiff was in his place in the line, running towards the rail next to be loaded, and while in the exercise of due care, and without negligence on his part, a rail

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which had been thrown upon the said car so moving fell off in such a manner as to strike the plaintiff upon the arm and leg, and so broke and crushed his leg near the ankle as to render its amputation necessary.

Plaintiff avers that the injury was in no manner caused or contributed to by any negligence on the part of his fellow-workmen, but was the result of the negligence and unwarrantable manner in which the defendant required the work to be done. The charge is that it was the duty of the defendant to furnish the plaintiff, not only with reasonably safe place and appliances for the performance of his duty, but also to secure to him the right to the performance of his work in a manner reasonably safe; yet, notwithstanding this duty, the defendant negligently and wrongfully furnished him flat-cars to be loaded by him with steel rails, lying along the track of said road, without appliances to prevent such rails from falling off, and required said rails to be loaded from the place where they lay without regard to the width of the available track or path along-side the train upon which they were to be loaded, and furnished for plaintiff's assistance men who were untrained and unskilled in such work, of which fact plaintiff was ignorant, and wrongfully and negligently, and with notice of the premises, required such rails to be loaded while said flat-cars were being moved by the engine attached to them at a dangerous rate of speed.

It is further claimed that, if the cars were standing still, the men were able to heave the rails upon them so as to load them safely and securely, but that while the cars were in motion it was difficult to load them evenly and securely, and that the business of loading said rails was properly the work of men especially employed and trained thereto; that it was not such work as was within

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the ordinary scope of plaintiff's employment, and was more laborious and more dangerous, and that the requirement of said defendant that plaintiff should do such work was wrongful, and in disregard to plaintiff's rights under his employment; that he did not know what was the limit of his duty, or his rights under his contract of employment, and had no knowledge or notice of any danger attending the work he was so directed to do, but which was well known to defendant and its agent.

The plaintiff introduced testimony tending to show that he had no previous experience in railroad work of any kind; that the rails laid in line along the side of the track for a distance of some three miles, and the men were required to load them with the train moving at from one to four miles an hour. Each rail was 30 feet long, and weighed 650 pounds, and not over 16 men were at each rail at any time. Plaintiff claims that the work was very hard and severe, and that part of the men gave out before the injury, and left an insufficient force to do the work, but that he did not know this until after his injury; but direct evidence upon this branch of the case was excluded by the court. It appears that the men would lift a rail, and heave it on the car, and then instantly turn and run with the train to the next rail, so as to heave it on the same car. While the train was going, as plaintiff's testimony tended to show, about four miles per hour, and when a mile of rails had been picked up, one rail "flew off, and bounded back," as it is expressed by the witnesses, and caught the plaintiff, who was, with the rest of the men, running to the next rail, threw him against the bank, and then fell upon his leg, and crushed it so that it had to be taken off below the knee. The plaintiff testified that he did not know that the work was dangerous, and that no instructions were given him,

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and that the rail which came off was thrown the same as the others. This testimony was corroborated by others.

The defendant's witnesses testified that the work was not dangerous; that rails often flew or bounded back, and that such rails would indicate by their sound that they were coming back; and that, if they did come back, they were liable to hurt some one, unless they got out of the way. There was no claim, however, that any one knew this, except a few of the more experienced hands, and no claim that the plaintiff, or the other inexperienced hands, were warned of it.

The circuit judge refused to permit the plaintiff to show how many of the men had had previous experience, or that the plaintiff had had no previous experience, or how hard the work was, or whether any of the men gave out before the accident, or whether the plaintiff was in a position where he could see the rail before it hit him, or whether he would have been hurt if the train had been standing still. The accident happened in a cut, the bank of which, as the plaintiff's testimony tends to show, was higher than plaintiff's head; that the men ahead of him and behind him, the bank at his left, and the rail bounding off at his right, made his escape impossible; that the men were as close together as they could work, the man ahead of him barely escaping the rail, and the man behind him having his boot scraped by it.

It appears by the defendant's testimony that the work was done occasionally in this way,—that is, the rails thrown upon the cars while moving,—but it does not appear to have been the usual way of loading such rails; the witnesses putting it from twice in one year to twice in nine years that rails had been loaded upon cars while they were in motion. The defendant introduced testimony tending to show that it was the duty of the sec-

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tionmen to do anything they were called upon to do.

The circuit judge, in taking the case from the jury, and directing a verdict in favor of the defendant, held that the company had the right to adopt any method of doing the work it saw fit, and that notice of the method was notice of the attendant risk. He also held that there was no law which would forbid the moving of the train while it was being loaded; that in the present case there was no latent defect, and the plaintiff had full opportunity to observe the manner of loading at the very outset; that any person of ordinary prudence would know that there was danger of being injured while engaged in the loading of cars with T-rails; and that the plaintiff voluntarily assumed the risk incident to such employment.

Defendant's counsel in their brief insist that the work of loading rails on cars, standing still or moving, was the proper work, if required, of sectionmen, and not unusual, and was in this case in consonance with the custom of defendant; that plaintiff entered defendant's employ with full knowledge of the services required, and the risk and danger of such work was readily discernible by him; that the plaintiff did not exercise due care, did not look out for danger, nor try to guard himself from danger; that the injury to plaintiff did not result from any defect in defendant's cars or road, nor from incompetency of its employés, nor from its happening in the cut with the high bank on the side where the plaintiff worked.

Defendant's counsel make the proposition that the plaintiff assumed the ordinary risks of the service on entering defendant's employ. They also claim that the assistant road-master, who had the direction of the work, and who directed the moving of the train while the rails were being loaded, was a fellow-servant of the plaintiff.

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It is also insisted that, before ordering the quicker movement of the train, Wahl asked the men if they could not load with the train moving faster; that he spoke to the men generally, and none of them objected, but all acted as though they could; that this was taken as an assent to the faster moving of the train, and the men went right along with their work. It is further claimed that the plaintiff was guilty of contributory negligence; that in entering defendant's employ as a sectionman he assumed the ordinary risks of that service, and the men were especially warned by the assistant road-master, before commencing to load, for each man to look out for himself and avoid danger; that it was his duty, irrespective of this warning, to exercise due care against the danger readily discernible of this service; that he did not look out for danger, did not see the danger, nor apprehend it, and was utterly regardless of it.

We cannot agree with the contention of defendant's counsel. Whatever the claim made by the plaintiff under the testimony which was given upon the trial, and the facts which plaintiff offered to prove, but which were excluded by the court, we are satisfied that the case should have been submitted to the jury as to the negligence of the defendant in directing, by its agent, the plaintiff and these workmen to load these rails upon the moving train, and whether, by the manner in which the rails were directed to be loaded upon the moving train, it subjected the plaintiff to unnecessary danger. We think the requirement of the assistant road-master, that these rails should be loaded upon the train while moving, was unreasonable, as it required unreasonable exertion upon the part of the men, and, under the circumstances here stated, might be found by the jury to subject the men to unnecessary danger. It is true that the

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defendant was not an insurer of the lives and limbs of the men engaged in that service, and that the plaintiff assumed the ordinary risks of the employment upon which he entered. But in the service of the railroad company as a sectionman, whose ordinary duties it is to repair the tracks and road-bed of defendant, he would not expect to be called upon to load rails upon a moving train. It appears to have been something unusual that sectionmen were called upon to load these heavy steel rails upon flat-cars, and especially where the cars were moving at such a rate of speed as four miles an hour, as stated by some of the witnesses in this case. The plaintiff assumed no risks except those which pertained to his employment and those which he understandingly assented to, and he had the right to assume that the danger was not increased by the manner in which the work was ordered to be done.

It is a well-established rule that the employer must furnish a safe place for his employés to work, and safe appliances or tools with which to do the work. It is as well the master's duty to provide that the manner in which the work is being done shall be also safe, and, in all cases where the danger can be readily guarded against, the employer is in duty bound to protect the employé at his peril. Mr. Wahl, the assistant road-master, had full charge and direction of this gang of men; he stood in the place of the master; he was a man of years of experience in railroading. The plaintiff had hired as a sectionman, and had had no experience in railroading, and Wahl must have known that the manner in which these men were directed to do the work, in putting these heavy rails upon a moving train, was dangerous. The court below found it so dangerous from the circumstances shown upon the trial that he held that any person of ordinary pru-

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dence knows that there is danger of being injured while loading these rails upon a moving train. It is apparent, however, that the plaintiff, by reason of his inexperience, did not apprehend the danger to life and limb in the manner in which the work was being done.

It is quite apparent from the record that the manner in which the defendant required this work to be done made it almost impossible to provide against the danger it created, or to give the plaintiff such notice of the approach of danger as to give him a chance to escape. The service required of the plaintiff was not in the ordinary line of a sectionman,—that is, sectionmen are not ordinarily called upon, as shown by the record, to load these heavy steel rails upon a moving train; and it therefore became, as we think, the duty of the court to leave the question of fact to the jury, under the circumstances to determine whether the manner in which the work was being done subjected the plaintiff to unnecessary danger, and whether the plaintiff could, under the circumstances, have avoided it.

The court was also in error in refusing to permit the plaintiff to show how many of the men had had previous experience, and that the plaintiff had had no experience, how hard the work was, whether any of the men gave out before the accident, whether the plaintiff was in a position where he could see the rail before it hit him, and that the work was more dangerous in loading upon the moving cars than as though the cars were standing still.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

CHAMPLIN, C. J., MORSE and GRANT, JJ., concurred. MCGRATH, J., did not sit.

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J. MAURICE FINN v. KATE DONAHOE.

[See 83 Mich. 165.]

Sale—Estoppel—Chattel mortgage.

Where, on the purchase of a stock of goods, it was agreed between the vendor and vendee and the vendee's father that, if he would advance $500 to his daughter to apply on the purchase price, he should be repaid out of the first sales made by the vendee, who afterwards secured such loan by a chattel mortgage of the goods, the vendor is estopped from claiming any lien for the unpaid purchase money as against an assignee of the mortgage.

Rehearing, upon application of plaintiff, of case reported in 83 Mich. 165. Argued June 11, 1891. Decided July 28, 1891. The facts are stated in the former opinion, which is overruled.

Hayden & Young, for appellant.

E. E. Osborn (*Charles R. Whitman*, of counsel), for plaintiff.

LONG, J. This case was in this Court, and an opinion filed November 14, 1890, which is reported in 83 Mich. 165. After the decision was rendered, a motion for a rehearing was presented, and a rehearing granted. The case has now been fully argued by counsel.

The reasons given by plaintiff's counsel for rehearing are:

"1. Because the Court misapprehended the case, as shown by the record, as to the point on which the judgment was reversed.

"2. Because Mrs. Donahoe is estopped from claiming out of the proceeds of the millinery stock the payment of

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any portion of the indebtedness to herself, as against Mr. Downing.

"3. Because Mrs. Donahoe cannot hold the stock, either under the bill of sale or under verbal agreement, to secure the payment for goods added to the stock by Mr. Donahoe, as purchaser or guarantor, and for which Mrs. Donahoe was in no respect liable.

"4. Because all the goods which were added to the stock subsequent to its purchase by Mrs. Southerland were fully paid for; part in cash, and the remainder in goods taken from the store by Donahoe.

"5. Because it is undisputed that no payment upon the bill of sale was due Mrs. Donahoe before July 1. She took possession upon May 21, under a verbal agreement not sufficient to constitute a pledge. Her possession at the time the writ was issued must have been under such verbal agreement, which, being neither a pledge nor a mortgage, is no defense in this case.

"6. Because there has never been a hearing upon the point upon which the judgment was reversed."

Counsel for plaintiff now argue that it is not contended that the agreement between Mrs. Sutherland, Mrs. Donahoe, and Mr. Downing, by which Downing was induced to advance $500 to his daughter to enable her to buy the stock, constituted either a mortgage or an agreement for a mortgage on the stock; but it is contended that when Mrs. Donahoe agreed with Downing that, if he would advance this money, he should be repaid out of the first proceeds of sales of the property, and was thereby enabled to make a sale which she was seeking to accomplish, she is now estopped from setting up a subsequent agreement between herself and Mrs. Sutherland to defeat Downing's claim for those proceeds.

The facts are so fully stated in the former opinion that it is not necessary to restate them here. It was there held by this Court that if Mrs. Donahoe went into possession of the goods under her bill of sale with the consent of Mrs. Sutherland, and was in such possession when the chattel mortgage was executed, then her rights were

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superior to the mortgagee, or his assigns, and therefore it would make no difference that the bill of sale was not on file. It is quite apparent from the argument now presented that the Court, in passing upon the case on the former argument, was laboring under a misapprehension as to what the real claim of the plaintiff was. It was understood by this Court that the plaintiff was attempting to assert his rights as mortgagee, or as assignee of the mortgagee, and claiming that his mortgage should have priority of lien over Mrs. Donahoe's bill of sale, for the reason that she had kept it from the record, but that, if she claimed under a verbal arrangement made with Mrs. Sutherland as to possession, there was no such possession by Mrs. Donahoe as would operate as a prior claim to the mortgage in the hands of plaintiff, who apparently took it in good faith.

We think from the arguments now made, and after a thorough consideration of the points in controversy, that plaintiff's counsel are right in their contention, that Mrs. Donahoe must be held estopped from setting up any claim to the goods to defeat the mortgage. The case was very fairly and fully submitted to the jury under the charge of the court. The court charged the jury that if they found, from the evidence, that the agreement between the parties was that Mrs. Sutherland was to pay her father the $500 before paying the defendant, then the plaintiff would be entitled to recover; for the mortgage under which he claims was one given by Mrs. Sutherland in pursuance of that agreement with her father, and by her father assigned to the plaintiff, and he would succeed in that event to the rights of the mortgagee.

Had we understood the position of plaintiff's counsel before the former opinion was rendered as we now understand it, a different conclusion would have been reached.

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As we now understand it upon further argument, we are satisfied that there was no error in the case; and the former opinion must be overruled, and the judgment affirmed, with costs.

MORSE and MCGRATH, JJ., concurred with LONG, J.

CHAMPLIN, C. J., took no part in the decision, and GRANT, J., did not sit.

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JOSEPH ROSENFIELD AND LOUIS MAY, EXECUTORS OF THE LAST WILL AND TESTAMENT OF MOSES MAY, DECEASED, v. ALBERT B. CASE.

Chattel-mortgaged property—Execution—Replevin—Payment—Appraisals—Evidence.

1. Chattel-mortgaged goods were replevied from attaching creditors by the mortgagees before the completion of an inventory, and on the trial the defendants claimed the right to recover on the ground that the attachment was made subject to the mortgages, which were admitted to be valid, and that defendants had the right to the joint possession of the goods until the inventory was completed, and also on the ground that the mortgages were being fraudulently used to defeat the claims of other creditors. And it is held that the defenses were antagonistic, and that evidence of such fraudulent use of the mortgages was properly excluded.
2. A question whether or not a demand was made at a stated time for the joint possession of chattel-mortgaged property is not objectionable as calling for the conclusion of the witness.
3. Evidence of the disposition made of chattel-mortgaged property after its replevin by the mortgagee is immaterial to the issue, the rights of the parties being fixed by the situation at the time the writ issued; citing *Merrill v. Denton*, 73 Mich. 628.
4. Where after the replevin of a stock of goods from a sheriff, who has seized the same under an attachment, he levies other attachments upon the goods, the appraisals made in the later

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suits are admissible as tending to show the value of the goods, in connection with evidence tending to show that there had been no material change in the goods since they were replevied.

5. The contention that a sheriff who attaches chattel-mortgaged property cannot be disturbed in his possession by the mortgagee until an inventory is completed, after which he has the right to fix the character of his levy, and whether in opposition or subject to the mortgage, has been settled in the negative in *Merrill v. Denton*, 73 Mich. 634, 635.

6. An instruction that, if a sheriff levied an attachment upon a stock of goods subject to a chattel mortgage, he cannot recover in a replevin suit brought by the mortgagee unless the value of the goods exceeds the amount of the mortgage, is sustained.

7. Where a mortgagee is entitled to the possession of the mortgaged property, as against attaching creditors, at the time he replevies it, the after payment of his mortgage by a second mortgagee will not affect his right to a judgment against the defendants.

8. The attachment of chattel-mortgaged property in opposition to the mortgage, and the refusal of the officer to admit the mortgagees to a joint possession, justifies them in demanding possession under the insecurity clause in their mortgage, whether the debt secured thereby is due or not due.

9. Evidence of the estimate of value placed upon a stock of chattel-mortgaged goods by the owner and mortgagor is inadmissible in a suit between the mortgagees and the mortgagor's attaching creditors.

Error to Benzie. (Aldrich, J.) Submitted on briefs June 11, 1891. Decided July 28, 1891.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

McAlvay & Grant and *Ramsdell & Benedict*, for appellant, contended as stated in the opinion, citing no authorities.

G. A. Wolf, for plaintiffs, contended for the doctrine of the opinion.

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MORSE, J. This is an action of replevin brought for a stock of goods owned by Jacob May at Frankfort, Mich. The plaintiffs held a mortgage on this stock, and there were also four other mortgages upon it. At the time of the trial these mortgages amounted to $6,129.84.

The defendant is the sheriff of Benzie county, and, at the time the writ of replevin was served, was in possession of the goods under attachment levies, and was taking an inventory of the same. Upon the trial the validity of the five mortgages was admitted by the defendant, and the whole question in issue was whether the sheriff levied in opposition to the mortgage of plaintiffs or subject to it. The jury found for the plaintiffs, and they had judgment.

We shall notice only such assignments of error as we deem important enough for discussion. Many are assigned that are of no importance whatever.

Mr. McAlvay, of counsel for defendant, stated to the court that they did not contest the mortgages, but did contest the use the parties were making of the mortgages to defraud the unsecured creditors. Mr. Parker, an attorney at law and a witness for plaintiffs, testified, on cross-examination, that, at the time the sheriff levied the attachments, he was in possession of the goods under a foreclosure of a mortgage to one Otto Krause, one of the five mortgages heretofore referred to. He was asked what he had done under that mortgage. Mr. McAlvay stated, in support of this question, that he proposed to show that there had never been any legal foreclosure of the Krause mortgage; that Parker and G. A. Wolf, who were attorneys for all the five mortgagees, were acting jointly and in concert; that they did not intend to foreclose this mortgage legally, but took the steps they did in a pretended foreclosure for the purpose of using these mortgages to "freeze out" the balance of the creditors.

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Mr. Pratt, of counsel for plaintiffs, objected to the question, on the ground that defendant's counsel had stated in the outset that they did not question the validity of plaintiffs' mortgage, or of any of the mortgages; that, if the defendant intended to show a fraudulent use of the mortgages, then it must be that it was proposed to show that the sheriff levied in antagonism to the mortgages, and to maintain that he had a right to do so, because of such fraudulent use. But defendant's counsel maintained that they did not intend to claim that the sheriff levied in opposition to the mortgages, but subject to them; and that was their main defense upon the trial. This being so, it could not concern the jury whether a fraudulent use was made of the mortgages or not. If the sheriff levied subject to them, they were acknowledged by him to be a lien upon the goods, having preference over his levies. The defendant could not blow hot and cold. He could not claim that he was entitled to recover because he levied subject to the mortgages, and recognized their validity, and was, therefore, entitled to hold joint possession with them, and complete his inventory, and at the same time claim that he was entitled to hold the goods against the mortgages, because they were being fraudulently used to defeat the claims of other creditors. His levies were either made subject to the mortgages, or in opposition to them. He could not maintain both defenses, as they were antagonistic. The court was right in not permitting any evidence of the fraudulent use of the mortgages to be introduced. The court, however, said to the defendant's counsel that, if any fraudulent acts could be shown on the part of plaintiffs, such acts would be received in evidence. Nothing of this kind was offered.

Defendant undertook to show by one Florsheim the estimate of value that Jacob May put upon the stock of

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goods. This was properly excluded. The admissions of May could not bind plaintiffs, and the offered testimony was purely hearsay.

The following question was asked the defendant:

"I will ask you whether or not he made any demand at that time on you, Mr. Case, for joint possession?" (referring to a conversation on the 7th of January, 1889, with G. A. Wolf, attorney for plaintiffs, the day before the writ of replevin was served in this suit.)

The question was objected to as calling for a conclusion of the witness, and excluded by the court. We think the question was a proper one, but as he was permitted to and did give all the conversation he had with Wolf, and also testified that neither Parker nor Wolf asked him for joint possession before the writ of replevin was served, no error was committed to the prejudice of defendant.

The court admitted considerable evidence as to what was done with the stock of goods after they were replevied, but afterwards struck it out of the case. The rights of the parties in this suit must be fixed by the situation at the time the writ was issued. What was done with the goods thereafter was immaterial to the issue in this suit. *Cary v. Hewitt*, 26 Mich. 228; *Merrill v. Denton*, 73 Id. 628.

Testimony was introduced of three or more appraisements made of these goods, touching upon their value. The appraisal partly completed by the sheriff before the service of this replevin writ was offered by the defendant. The plaintiffs showed the appraisal made in this suit, and also appraisals made in some attachments levied by the sheriff after the commencement of this suit. It would seem that other attachments were levied by the sheriff after the service of this writ, and plaintiffs were compelled to replevin the second time. The evidence of

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the amount of the appraisals under these later attachments, coupled with testimony tending to show that there had been no material change in the stock since the replevin in this suit, was competent as tending to show the value of the goods replevied.

The testimony of one Vorheis, taken upon another trial in this cause, was read in evidence, upon a showing that he was out of the jurisdiction of the court. This is assigned as error, as no showing was made that his deposition could not have been taken. It was shown that he left that spring or summer (the trial was in September, 1889) for the south, and was somewhere in Tennessee. His family still resided at Frankfort, Benzie county. We think no error was committed in the reception of this evidence. His testimony related to the appraisal in the present suit. He was one of the appraisers. A. J. Doyle and T. C. Anderson were the others. He identified his signature to the appraisal, and gave his opinion as to the value of the goods, and that he noticed no material difference in the stock between his appraisal and the subsequent appraisal upon the last attachment. It appears that he was fully cross-examined by the defendant's counsel, which cross-examination was also read in evidence. Mr. Anderson was sworn on this trial, and gave substantially the same evidence as that of Vorheis.

It is contended that the sheriff had the right to finish his inventory, and could not be disturbed in the possession of the goods until it was completed; and that, after it was done, it was his right to fix the character of his levy, whether it should be in opposition to or subject to plaintiffs' mortgage, but until then his possession was rightful, in any event. The law in this State has been settled against this contention by *Merrill v. Denton*, 73 Mich. 634, 635.

The court instructed the jury that, if they found that

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the defendant levied subject to the mortgages, he could not recover, unless the value of the goods was found to be in excess of $6,129.84, the amount of the five mortgages. This is claimed to be error. It is argued that there was nothing due on any of these mortgages at the time the sheriff levied. This would make no difference. If the levies were made expressly subject to all these mortgages, as the defendant was contending they were, then he certainly could not claim anything except the balance remaining over and above the full amount of them. It is said by defendant's counsel that they were not trying the case as to all these mortgages, and what the interest of their holders might have been in the goods was of no concern in this suit. But the defendant was beaten by the jury on one of two propositions:

1. That he levied in opposition to the mortgages, which were conceded to be valid, in which case his levies were illegal and void; or—

2. That the value of the goods taken was not in excess of the amount of the mortgages, in which event, if he levied subject to them, there would be nothing covered by his levy.

The charge of the court in this respect was correct.

The court was asked to instruct the jury that, if plaintiffs' mortgage had been paid and satisfied, they could not recover. This was refused, and properly so. There was no pretense that the mortgage was paid at the time this suit was commenced, but it was shown by the cross-examination of one of the plaintiffs that their mortgage had been paid, since the beginning of this suit, by Mr. Krause, who held one of the other mortgages. If Krause's mortgage was a valid one, and it was conceded on the trial by the defendant that it was, he had the right to pay the mortgage of plaintiffs, which was of the same date and filing of his own; and the plaintiffs could sell it, or receive their pay from him upon it,

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without detriment to their case in this suit. If, at the time of the issuing of the writ, they were entitled to the possession of the goods as against the defendant, the fact that their mortgage was afterwards taken up and canceled by another mortgagee could not in any way affect their right to recover judgment against defendant.

It is claimed that the court erred in not instructing the jury, as requested by the defendant, that,—

"At the time of the levy of the attachments in question, the mortgage of the plaintiffs was not due, and they were not entitled to possession of the property levied upon for the purpose of foreclosure."

The court very clearly submitted the case to the jury upon the only issues in the case, to wit, the character of the levies, whether opposed to or subject to the mortgages; and the value, as connected with the other issue, if they found the levies were subject to the lien of the mortgages. If the plaintiffs had the right of possession for any purpose, it was sufficient. The mortgage contained a clause authorizing them to take possession at any time when they deemed themselves insecure. When the sheriff levied upon the property, and made the levies in opposition to the mortgage, and refused even to let the plaintiffs into joint possession with him, they were certainly justified in deeming themselves insecure, and in demanding possession of the property. Whether the mortgage was due or not was entirely immaterial, and the court was right in not lumbering up the case with matters entirely irrelevant to the issues involved.

The judgment is affirmed, with costs.

The other Justices concurred.

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WILLIAM FEDERSPIEL v. EDWARD JOHNSTONE AND CERTAIN LOGS OF JOHN B. KANOUSE AND HITCHCOCK & BIALY.

Log-lien proceedings—Service of attachment—Verdict—Judgment.

1. In an attachment suit under the log-lien law of 1887 (Act No. 229) it is not necessary to appraise the property, or to serve a *certified* copy of the writ or the inventory upon a log-owner who is not the defendant in the suit; such service being governed by section 6 of the act.
2. The lien of a laborer under the log-lien law of 1887 does not depend upon the state of the accounts between the contractor for whom he labors and the log-owner, whose liability is limited to the contract price, which he pays to the contractor at his peril.
3. The correction by the court of a verdict in a log-lien suit in excess of plaintiff's claim by entering a judgment for a smaller sum, and less than the amount shown to be due plaintiff on the trial, is held not to authorize the granting of a new trial.

Error to Arenac. (Cobb, J.) Argued June 11, 1891. Decided July 28, 1891.

Attachment under log-lien law of 1887. Defendant log-owners bring error. Affirmed. The facts are stated in the opinion.

E. W. Porter, for appellants, contended *as stated* in the opinion.

Lawrence McHugh, for plaintiff, contended for the doctrine of the opinion.

MORSE, J. This action was brought under Act No. 229, Laws of 1887, known as the "Log Lien Act." Nine claimants united their claims, and designated one of their

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number, the plaintiff, to prosecute the suit. The logs and timber attached were the property of eight different individuals and firms, who had separate lumbering contracts with the defendant Johnstone.

The appellants, the defendants Kanouse and Hitchcock & Bialy, claim that the judgment is void so far as their logs are concerned, and should be reversed in so far as it affects said logs, for the following reasons:

1. The officer, a deputy sheriff of Arenac county, who served the writ of attachment upon the appellants did so by handing to them personally a copy of the writ of attachment, and also of an inventory of the goods and chattels seized by him, but such copies were not certified, nor did he serve any certified copy of either the writ of attachment or inventory upon them, or either of them, and no appraisal was made of the attached property.

2. There was nothing owing from the appellants to the contractor, Johnstone, at the time this suit was begun, and the jury should have been instructed in such case to find a verdict for the appellants.

3. The plaintiff did not prove affirmatively the amount of his individual claim against the logs of appellants.

We will review these objections in their order.

1. It is claimed by the counsel for the log-owners that Act No. 229, Laws of 1887, repealed all former acts relative to log liens, in which it was provided that it was not necessary to make an inventory and appraisal (see section 11, Act No. 145, Laws of 1881; How. Stat. § 8422; *Streeter v. McMillan*, 74 Mich. 126), and that section 11 of the act of 1887 provides that—

"All writs of attachment issued under the provisions of this act, by any of the circuit or justices' courts of this State, shall be served and returned as ordinary writs of attachment are served and returned in said courts, respectively, except as herein otherwise provided."

That, in ordinary writs of attachment in the circuit court, an appraisal must be made and returned with the writ (How. Stat. § 7992), and a copy of the attachment

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and inventory must be served upon the defendants, certified by the officer serving the same (Id. § 7991). See, also, *Stearns v. Taylor*, 27 Mich. 89.

Section 11, however, of the act under consideration, is qualified by the words, "except as herein otherwise provided." By turning to section 6 of the act, we find a provision for service upon the owners of logs when the defendant in attachment is not the owner of the property or products described in the writ. The officer executing such writ—

"Shall serve, or cause to be served, a copy of said attachment on or before the return-day mentioned in said writ upon the owner of said products, or any of them, their proper agent or attorney, if such owner, or agent, or attorney be known to him, and residing in this State."

It will be seen that the service of an inventory is not required, or that the copy of the writ shall be certified. This section 6 is the only section, except section 11, relating to the service of the writ, and no especial mode of service is anywhere mentioned to be made upon the defendant in attachment, except in section 6, where it provides that he shall be summoned to appear before said court, at the time and place therein specified, the same as in ordinary writs of attachment in circuit and justices' courts. We are of the opinion that the service mentioned in section 11 is not required in the case of a log-owner who is not the defendant in attachment, and who is notified of the proceedings, so that he may protect his interests in the products attached; and that the notice to be given is the one provided for in section 6. In this case there is no claim that the copy of the writ and inventory served upon the appellants was not a true copy, and we see no good reason for quashing the proceedings because such copy was not certified by the offi-

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cer to be a true copy, when the statute does not in terms require it.

We do not think that an appraisal of the property was necessary. The statute does not specify that any shall be made, unless by implication, in section 11. By an act of the Legislature in 1885, property of the kind taken under this writ is not, any of it, exempt from sale for payment of labor debts.[1] Therefore an appraisal could be of no benefit to the log-owner, as he has no exemption to select, and a bond that he may give for a release of the property attached has no relevancy to the amount or value of the goods attached, but is to be in a sum double the amount claimed in the writ. It must also be remembered that in these cases the logs or other products are seldom moved from the place where they are found; the law expressly providing that they shall not be seized upon or detained while in transit from the place where banked or deposited to any place within this State, but in such case, if the logs are in the hands of a person or corporation "driving or holding the same" for the purposes of being driven, sorted, or delivered to the owners, the sheriff who makes the levy shall serve a copy of the attachment upon such person or corporation, and, when driven or sorted out, may receive such products from said person or corporation, which person or corporation shall hold his or its lien under the statute, notwithstanding the levy of the sheriff. When sale is made, the proceeds are to be distributed *pro rata*, under the special order and direction of the court. Laws of 1887, § 6, Act No. 229; 3 How. Stat. § 8427*f*.

2. The circuit judge was requested to instruct the jury that—

"If there was nothing owing to the defendant John-

[1] 3 How. Stat. § 7717*a*2.

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stone, from the log-owners or any of them, at the time these attachment proceedings were commenced, then the lien in that case would not attach to such logs, upon which there was nothing owing to Johnstone from said owners."

Johnstone testified that he did not have anything due him from the appellants when these proceedings were begun; that he had been paid in full. Under the log-lien law, the lien of the laborer does not depend upon the state of the accounts between the contractor for whom he labors and the owner of the logs. It was not intended that the owner could escape the lien that the law, under certain circumstances, places upon his logs or timber in favor of those working thereon, by paying the contractor who hires them regardless of their claims. If such were the law, the intent of the statute might easily be defeated. The owner cannot be made liable for any amount more than he contracts to pay for the getting out of the logs, or any other labor to be performed upon them, but to the amount of such contract price he pays the contractor at his peril. We see no constitutional objection to this law in this regard. It cannot be difficult for the log-owner to guard against loss in this respect, as he ought to be able to inform himself whether or not the laborers have been paid, and to withhold a payment to the contractor until he is satisfied that their claims have been or will be discharged.

3. It seems that defendant Johnstone gave to plaintiff a time order for his work amounting to $54, in payment of his work in full on the Kanouse and Hitchcock & Bialy logs. Plaintiff was unable to state just how much there was due him for work on these particular logs. One Mudge, the book-keeper of Johnstone, who drew this order and gave it to plaintiff, testified that he put some of another man's time (Fabing) into to this order given to

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plaintiff, but he could not or did not state how much. We think that the plaintiff was presumptively entitled to the amount of this order, less $5, which was shown to have been paid upon it. At least, the jury, under the circumstances, were justified in finding that this amount was due Federspiel for his work, in the absence of any reason being given why any portion of Fabing's time should have been included in it, without mention, when time orders were given each of the men separately for the balance due them. They were authorized to find that it was not true that any of Fabing's work was included in this order.

The jury brought in a verdict for the sum of $43.75, as a lien upon the Hitchcock & Bialy logs, and of $62.50 upon the logs belonging to Kanouse, this being considerably in excess of the amount claimed by plaintiff. The court in his judgment corrected this verdict, and entered judgment for $21.04 against the Hitchcock & Bialy logs, and $30.06 against the Kanouse logs. He did not allow, it will be seen, the full amount of the order, with interest to plaintiff, the debt drawing interest from March, 1888, to the time of the trial, which took place in November, 1889. We can see no injustice in this correction, and it does not authorize the granting of a new trial.

The judgment is affirmed, with costs.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred. GRANT, J., did not sit.

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WILLIAM FEDERSPIEL v. EDWARD JOHNSTONE AND CERTAIN LOGS AND TIMBER OF JOHN MCLENNAN, A. T. BLISS & BRO., AND BLISS, TYLER & SON.

[See *ante*, 303.]

Log-lien proceedings.

This case is ruled by the opinion filed in *Federspiel v. Johnstone*, *ante*, 303.

Error to Arenac. (Cobb, J.) Argued June 11, 1891. Decided July 28, 1891.

Attachment under log-lien law of 1887. Defendant log-owners bring error. Affirmed. The facts are stated in *Federspiel v. Johnstone, ante,* 303.

E. W. Porter, for appellants.

Lawrence McHugh, for plaintiff.

MORSE, J. This case is an appeal in the same suit as *Federspiel v. Johnstone,* 87 Mich. 303. The objections to the judgment are confined to the service and return of the writ of attachment, and are identical with those raised in the first case, and must be governed by the decision in that appeal.

The judgment is therefore affirmed, with costs.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred. GRANT, J., did not sit.

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August Schroeder v. The Farmers' Mutual Fire Insurance Company of Ogemaw, Arenac, and Iosco Counties.

Mutual insurance company—Withdrawal of member—Surrender of policy—Charge to jury.

1. Where the charter of a mutual fire insurance company provides for the withdrawal of a member by returning his policy to the secretary, and paying all assessments to which he is then liable, such withdrawal cannot be effected so as to release the member or the company from liability without surrender of the policy.
2. It is error to instruct the jury that the undisputed testimony shows a certain state of facts when there is contradictory testimony on the subject.

Error to Ogemaw. (Simpson, J.) Argued June 18, 1891. Decided July 28, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Tarsney & Weadock, for appellant.

Markey & Hall, for defendant.

Long, J. On the 24th day of January, 1888, plaintiff became a member of the defendant company, taking out a policy on his dwelling-house, furniture, clothing, and provisions therein, and upon his barn, hay, and grain. On the 20th day of January, 1890, his house and contents were destroyed by fire. He presented his proofs of loss to the secretary of the company, and asked to have it adjusted. The company refused payment upon the ground that he had voluntarily withdrawn from the

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company prior to the time of the fire. This action was commenced by declaration, and the defendant pleaded the general issue, with notice of such voluntary withdrawal. On the trial, verdict and judgment were rendered for the defendant.

Plaintiff brings error. But two questions are raised in this Court.

The only question at issue below was whether the plaintiff, at the time of his loss, was a member of the company. Mr. Rose, secretary of the company, testified that on November 21, 1889, the plaintiff paid up his dues and assessments, and directed him to take his name off the books, as he desired to withdraw from the company; and that in pursuance of that he made an entry upon the books in pencil, "Withdrawn, Nov. 21, 1889; policy not returned." Mr. Rose further testified that he had a conversation with plaintiff some time before this, three or four weeks, in regard to his insurance, in which the plaintiff said the insurance was too high, and he could not stand it, and he would have to carry his own insurance thereafter; that when the $4 was paid, on November 21, he told the plaintiff he would take his name off the books, and would do it that night, to which the plaintiff responded, "Very well," and that he made an entry upon the books that same evening; that the $4 paid all the plaintiff's assessments and dues up to that time, and since which time the plaintiff has not been treated as a member of the company; that he reported this fact to the directors of the company at their meeting on January 7, 1890.

The plaintiff contends, and so testified upon the trial, that he never stated to the secretary that he intended to withdraw from the company, and had no talk with him in reference to a withdrawal, but that he paid his assess-

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ments, when called upon, and still regarded himself as a member of the defendant company.

The question thus raised was submitted by the court in its general charge to the jury, and they were directed:

"If Mr. Schroeder did meet Mr. Rose, the secretary of the company, and square up everything with the company, and it was agreed between them, or was talked so that each understood it, and understood it alike, that that should end their relations under this policy, then I charge you, as a matter of law, it was a contract which rescinded or ended their relations; and if they agreed to it, and understood it alike, and parted with that understanding, then I say that Mr. Schroeder ceased to be a member of the company, and the company ceased to be liable to him for any obligations, and he ceased to be liable for any."

The court further instructed the jury as follows:

"Now, then, gentlemen of the jury, in this policy, if the company desired to, there is a provision in the charter whereby they could require of Mr. Schroeder, before they released him from the obligations, that he surrender the policy. That was a matter they had a right to demand of him. If he had the policy, they had a right to have it surrendered before they released him, because the charter says that any member may be released from his connections by delivering his policy, and so signifying, and having it understood it squared up his account; and the undisputed evidence is that he did square up all his account with the company."

The contention of plaintiff's counsel is that the court was in error—

1. In leaving it as a question of fact for the jury to determine whether the plaintiff was a member of the company at the time of the fire.
2. In charging the jury that "the undisputed evidence is that he [plaintiff] did square up all his accounts with the company."

The defendant is a mutual insurance company, and

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each policy-holder is a member. Among the provisions of the defendant's charter is the following:

"Any member may, at any time, withdraw therefrom by returning his or her policy or policies to the secretary, and by paying all assessments made, or liable to be made, for previous losses and debts, and claims then due, or liable to become due, from such member to the company."

It appears that the policy was never surrendered, and that the plaintiff has at all times paid and kept up his assessments since the time he became a member of the defendant company. This provision of the charter, which required the surrender of the policy at the time of withdrawal, points out the manner in which the insured ceases to be a member of the company, and, under the circumstances here shown, it was the duty of the court to direct the jury that the plaintiff was yet a member at the time of the fire and of the trial of the case, for the reason that he had not complied with the terms and conditions of the charter by surrendering his policy at the time the secretary claims he withdrew from the company.

The court in its charge seems to have understood the right of the company to require the surrender of the policy before the withdrawal became operative and effective, so far as the rights of the company are concerned, and yet he directed the jury that the withdrawal became complete, if the secretary and the plaintiff so understood it, though the policy was not surrendered. In this the court was in error. There was no such act done as required by the charter in order to withdraw from the company, and, had a fire occurred by which other members met with losses, the plaintiff could have been held liable to an assessment for his proportionate share of such losses. This obligation still resting upon the plaintiff, the defendant company must be held equally bound, under the circumstances, to pay the plaintiff's loss.

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But even under the theory adopted by the court, that this arrangement, as testified to by the secretary, amounted to a release of the company, and operated to release the plaintiff from the company, the court was in error in stating to the jury that the undisputed testimony showed that plaintiff squared up all of his account with the company. The plaintiff testified that he paid all his assessments upon that date as demanded by the company, and did not intend to withdraw, contradicting what the secretary had testified to in regard to his intended withdrawal. From the language used by the court in its charge, the jury must have understood that there was no dispute by the plaintiff that he intended to and did square up his account, which is denied by the plaintiff, except that he paid his assessment as demanded.

The verdict and judgment must be set aside, and a new trial ordered.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred with LONG, J.

GRANT, J. I cannot concur that the surrender of the policy was essential to withdrawal.

If the testimony of the secretary was disputed, it should have been left as a question of fact for the jury.

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GEORGE ORTH v. WESLEY M. FEATHERLY.

Libel and slander—Words actionable per se—Mitigation of damages—Error without prejudice.

1. In a libel suit it appeared that the article complained of was libelous *per se*, and the malice of the defendant plainly appeared from the face of the publication. And it is held that the failure of the court to instruct the jury to consider, as affecting the question of exemplary damages, the claim of the defendant, supported by his testimony, that he was informed prior to publishing the article that the charges therein made were true, as showing his good faith, was non-prejudicial error; it appearing that the jury were instructed to consider the mitigating circumstances in the case, which were only shown by said testimony.
2. A publication alleging that a member of the board of supervisors charged a co-member during a meeting of the board with being a liar, a thief, and a perjurer, and stated that he could prove it, is libelous *per se*.
3. Where actual malice is shown in an action for slander or libel, the jury may always give punitive damages; citing *Newman v. Stein*, 75 Mich. 407.

Error to Iosco. (Kelley, J.) Argued June 19, 1891. Decided July 28, 1891.

Case. Defendant brings error. Affirmed. The facts are stated in the opinion.

M'Cutcheon & Elliott, for appellant.

Henry & Cornville, for plaintiff.

LONG, J. The plaintiff is a merchant carrying on a general business in the towns of Au Sable, Oscoda, and St. Ignace. The defendant is the proprietor and publisher of the Lakeside Monitor, published at Au Sable.

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This is an action of libel, brought upon the following article published in defendant's paper, July 9, 1887:

"GEORGE ORTH IN DEEP WATER.

"In the Monitor of last week there were propounded to George Orth several very pertinent questions, among which was one wherein Orth was asked if he, as supervisor of the poor, ever furnished supplies to the inmates of the Shore Hospital, and charged them up to the county at two prices. At a meeting of the board of supervisors, Wednesday, Supervisor B. F. Smith introduced a resolution, to which was attached the Monitor's article referred to, asking that the board bounce Orth on general principles. Some of the members advocated summary disposal of the services of Orth in telling language; among them being Scott Buell, who most emphatically stated that Orth was a liar, a thief, and a perjurer, and that he could prove every word he said. The original resolution was amended so as to allow Orth to produce witnesses that these matters were false, if he could do so, and in default of such proof the board propose to graduate him with honors at their next meeting. We are told that the board have documentary evidence that all these things are true. People who live in glass houses should not throw stones. Give us another libel suit, Mr. Orth, and we will open out another fusilade of canister and grape which we have in reserve for your especial benefit."

From the record it appears that this was only one of the many articles published in the Lakeside Monitor by the defendant in reference to Mr. Orth.

The resolution of the board of supervisors to which this article refers is as follows:

"*Whereas*, it has been charged in a newspaper published in this county that George Orth, as superintendent of the poor, has been guilty of official misconduct, to wit, furnishing patients at Weir's Hospital with clothing, boots, and shoes from his store, and charging the county two or three prices for the same: Therefore, be it—

"*Resolved*, that the said Orth be required to appear before this board at its next session, and answer said charge, and that the chairman cause by subpœna the publisher of said paper to appear before this board to

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substantiate said charge, and the sheriff of this county serve a true copy on the said Orth to appear before this board, and answer said charge, or other matters relating to his official conduct."

After the publication of the article complained of, the board of supervisors had a meeting, investigating the charges made, and fully exonerated Mr. Orth from the charges by the unanimous vote of the board.

The defendant pleaded the general issue, with notice of special matters of defense:

1. That, in so far as the article purported to give the contents of the resolution of the board of supervisors, it was substantially true.
2. That if Orth's reputation for truth and veracity had suffered, and if he was suspected of false swearing and lying, it arose from his own acts in testifying in the Weir trial.
3. That Buell had in fact made the statements stated in the article, and that, if the article conveyed any erroneous impression that the statements of Buell were made on the board of supervisors, it was an honest mistake of fact in naming the place where Buell made the statements.
4. That the Monitor was a public newspaper, and that the article was published for the purpose of informing the public of what took place on the board of supervisors.

Upon the trial of the cause in the Iosco circuit, the plaintiff had verdict and judgment for $800. Defendant brings error. Thirty-seven errors are assigned. We shall only consider those which are discussed in the brief of counsel for the appellant.

The defendant's first contention is that the article is not libelous *per se*, and that the court was in error in so directing the jury. The court charged the jury on that question as follows:

"I charge you, as the law in this case, that the publication in question is defamatory and libelous, and action-

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able in itself upon its face. It is what is termed 'actionable *per se*.' Whenever a person, in printing or writing, charges another with a crime,—charges another with conduct which imputes the commission of a crime,—moral turpitude,—the law provides that such publications are actionable, and that malice will be inferred from the publication itself; and in the first instance no express malice—no actual malice—need be shown in order to entitle the party to redress or damages."

The court was not in error in this charge. The article is libelous *per se*. It states that Scott Buell charged the plaintiff with being a liar, a thief, and a perjurer before the board of supervisors at their meeting, and that he could prove every word he said. It turned out upon the trial that Scott Buell made no such statement before the board of supervisors, and the article in that respect was wholly false.

Defendant, however, testified upon the trial that, before the publication declared upon, Buell had told him that Orth was a liar, a thief, and a perjurer, and would steal everything he could lay his hands on, and that before the publication he (defendant) was in Orth's store, and saw him charge upon his books to the hospital goods which had never been purchased. He testified upon cross-examination, however, that he was unable to state whether it was $1 or $20, neither could he give the date of the month nor the year when this took place; that he never said anything about this transaction until after the time when Orth became a witness in the Weir trial. Defendant also testified that it came to him from a county officer, one Charles Marvin, and that he understood from Marvin that Buell used this language on the board of supervisors. Defendant testified upon that subject as follows:

"Charles Marvin said he had been down to the meeting of the board of supervisors, and 'they gave Orth the devil down there yesterday,' or 'raised the devil with

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Orth.' I asked, 'What did they do?' 'Well,' he says, 'they got that article in your last week's paper, and Smith had a resolution which he attached to it asking for an investigation.' Buell was right there (that is what he gave me to understand), and he says, 'Buell said he is a damn liar, a thief, and a perjurer, and that he could prove every word he said.' Buell had often before that time, upon different occasions, told me the same thing, without any solicitation whatever."

This testimony was offered for the purpose of mitigating damages. Under this testimony, it was claimed by counsel for defendant that the article published could only be regarded as a repetition of statements made by others which defendant believed to be true, and that he could not be held to the same measure of responsibility as though he had originated the statements set out in the article, though such statements may have been false in fact. The court charged the jury upon that question as follows:

"I also instruct you that it is no defense and no justification or excuse that he may have heard that such reports had been made by others. The repetition of such a charge, put into permanent form, to be circulated through the medium of the public press, even though it may have been said by somebody else, would constitute a libel; and it can afford no protection to the publisher of a newspaper, or any other person who prints or writes grave charges,—charges which, from their very nature must tend to injure the character and standing of another, and the property and business of another,—that some other person may have made the charge."

The court was not in error in stating to the jury that the fact that the defendant, under his claim, was merely repeating what he had been advised had been said by others, could not be urged by him as justification or excuse, as a repetition of the slander could not be justified on the ground that some other person had originated the slanderous statement. The jury may, however, have

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understood from this part of the charge that they had no right to take into consideration the fact that Buell had used this language, or that Marvin had so stated to the defendant, or that the defendant may have believed that Buell had so stated before the board of supervisors, and that Marvin had communicated that fact to him before the publication of the article, when they came to consider the question of damages. It was proper matter to go before the jury upon the question of damages, but the charge of the court entirely excluded it from their consideration, even upon that branch of the defense, as the court stated to them that it could not be used as a defense. As a part of the defense, the defendant claimed to reduce the amount of the plaintiff's damages, and offered the proof for this purpose. The court directed the jury that the only fact for their consideration was one of damages, and that the plaintiff was entitled to recover actual damages; and, if they found that there was actual malice entertained towards the person of the plaintiff in publishing the defamatory statement, they should add to the elements of actual damages such amount as they might think reasonable and right for injured feelings,—for the shame and disgrace he may have endured in consequence of these false statements.

It was not contended upon the part of the defendant, upon the trial, that Buell made these statements before the board of supervisors, but that at the time of the writing of the article and its publication he believed from what Marvin said to him, and from statements which he had heard Buell make before that time, that Buell did make the statements before the board as claimed in the article published. The court should have directed the jury, upon the question of exemplary damages, that they should take into consideration the claim made by defendant that he was advised by Marvin before the article was

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published that Buell had so made the statements before the board, as such facts would have a bearing in determining the malice of defendant towards the plaintiff in the publication of the article, which is one of the elements to be taken into consideration in determining the amount of exemplary damages.

The article was libelous *per se*, and the plaintiff was entitled to recover actual damages. In addition to this, he was entitled to recover punitive damages, if the facts proved establish express and wanton malice. Where actual malice is shown in an action for slander or libel, the jury may always give punitive damages. *Newman v. Stein*, 75 Mich. 407; *Knight v. Foster*, 39 N. H. 576; *Guard v. Risk*, 11 Ind. 156; *Armstrong v. Pierson*, 8 Iowa, 29; *Daly v. Van Benthuysen*, 3 La. Ann. 69. The amount of such exemplary damages must rest largely in the discretion of the jury, under proper instructions from the court, dependent upon the facts of each particular case. It is unquestionably true that the jury would naturally give to the plaintiff a larger amount of exemplary damages if they believed the article to have originated with the defendant, and the article to be false in fact, than they would give if it was shown that the defendant was merely repeating the words of another which he believed to be true. In order to recover exemplary damages, it was necessary for the plaintiff to show that the defendant was actuated by malice in its publication. Such facts could be shown by circumstances, as well as by direct proof. To rebut this, the defendant had the right to show the circumstances under which the article was published, that he believed it to be true, and that the facts upon which the article was based were given to him by another before the publication.

In the case of *Burt v. McBain*, 29 Mich. 264, it appeared

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that a witness, called for the prosecution to show the speaking of the words, testified upon cross-examination that she had previously heard the same story from others. On re-examination she was asked to state from whom. This was objected to, but allowed. It was said by this Court that this testimony was properly allowed in mitigation of damages.

As a rule, unless the matter complained of be privileged, the motive or intention of the speaker or writer is immaterial to the right of action. The law looks only at the words employed, and their effect on the plaintiff's reputation; but in all cases the absence of malice, though it may not be a bar to the action, may yet have a material effect in reducing the damages. In *Hinkle v. Davenport*, 38 Iowa, 355, it was held that proof was properly admissible that defendant repeated, and did not originate, the alleged slander, and that the jury might consider it in mitigation of damages, but not in justification. As a general rule, in actions of slander and libel the defendant may mitigate damages by showing any circumstances which tend to disprove malice. *Storey v. Farly*, 86 Ill. 461; *Galloway v. Courtney*, 10 Rich. 414; *Wozelka v. Hettrick*, 93 N. C. 10; *Morris v. Lachman*, 68 Cal. 109.

Defendant's counsel also claim that the court was in error in submitting to the jury the question of damages plaintiff sustained to his business by reason of the publication of the libelous article. There was no error in this. The declaration counted upon such injury, and all the proofs tended to show a falling off in the plaintiff's business by reason of the publication of the article in question.

Some claim is also made that the court was in error in

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the reception and rejection of evidence. We find no error in this part of the case.

There was no error in the refusal of the court to give defendant's requests in his charge to the jury, and in the giving of such of the plaintiff's requests as were given.

The only error we find in the whole record relates to the charge of the court which excluded from the jury, in determining the plaintiff's damages, the fact that the defendant claimed to have acted in good faith in the publication of the article, and upon a state of facts which he believed at the time to be true. For this reason the judgment should be reversed, and a new trial ordered.

GRANT, J. We think the malice in this case is so apparent upon the face of the publications that the error pointed out by our Brother LONG was without prejudice. The judge did instruct the jury that they should consider the mitigating circumstances. The testimony as to good faith was admitted, and constituted the only mitigating circumstances.

Judgment is affirmed.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred with GRANT, J.

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MARTHA WINTER AND SUSAN M. STRONG v. JACOB TRUAX.

Guardian and ward—Sale of lands—Purchase by guardian.

1. No title passes by the sale and conveyance by a guardian at guardian's sale of the land of his ward, and its immediate reconveyance to him *individually* by the purchaser for the same consideration; citing *McKay v. Williams*, 67 Mich. 547.
2. When the authority appears upon the face of the instruments, there is no presumption of honesty in a transaction by which the title of a *cestui que trust* is divested, and invested in the trustee.

Error to Tuscola. (Beach, J.) Argued June 19, 1891. Decided July 28, 1891.

Ejectment. Plaintiffs bring error. Reversed. The facts are stated in the opinion.

Osborn & Mills, for appellants, contended for the doctrine of the opinion.

H. H. Markham (*T. W. Atwood*, of counsel), for defendant, contended:

1. The grantor in a deed is presumed sane and competent to make and execute the deed until the contrary appears; citing *Howe v. Howe*, 99 Mass. 88.
2. The order by the Ohio probate court is not evidence of insanity; citing *Rice v. Rice*, 50 Mich. 448, 53 Id. 432.

CHAMPLIN, C. J. This is an action of ejectment, brought to recover possession of the equal undivided one-half of the N. E. ¼ of section 10, in township 12 N., of range 8 E., which the plaintiffs claim in fee. The land is situated in the township of Juniata, in the county of Tuscola. The defendant had judgment in the court

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below, and the plaintiffs bring the case here upon writ of error.

Fourteen errors are assigned, all of which are waived except the eleventh, twelfth, and thirteenth, which read as follows:

"11. The court erred in charging the jury as follows: 'I take it that a sale might be made to a person who was in collusion with the guardian or an administrator, and yet a subsequent purchaser act in good faith. He would be one who had no knowledge of the collusion; who had not notice of it; was not aware of the want of authority. The question here turns as to whether these proceedings are such as to put Mr. Truax upon notice that there was bad faith in the proceedings.'

"12. The court erred in charging the jury as follows: 'Now, the question of bad faith even in the purchase, the purchase at the guardian's sale, is one entirely of presumption. He presumed it without any proof. Why Wright did afterwards deed to the guardian is possibly explained in the record. It would be an act in the line of the guardian's trust to have taken that deed back again to himself. It would not be a violation of his trust; it would be regularly included in the line of that trust. Taking it while he was guardian, it inured to the benefit of his ward. The trust would be just the same, and there is nothing inconsistent with the actual good faith of a guardian in taking a deed to himself for the purpose of making a more advantageous sale; that is quite often done. A sale is very often made in this State to a party who holds simply in trust, that a guardian or administrator may afterwards make a more advantageous sale by having time. So the question of bad faith by a guardian only is open upon this record, and the question of good faith of Mr. Truax is apparent on the record; that is, he is not charged as a bad-faith purchaser, except constructively by the record; and that turns again upon the question of whether that record affords enough notice, even to an inquiring lawyer, so that he could say that these proceedings were notice of bad faith. * * * This is an ejectment case, and the defendant is in possession, and has made his improvements there. If that construction is to be put upon that particular section of the statute, I prefer the Supreme

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Court to put it on. Under this impression of the law, it would be my duty to direct a verdict for the defendant.'

"13. The court erred in directing the jury to find a verdict in favor of the defendant, and as against the plaintiffs."

The facts shown by the record are that in 1873 Andrew Shultz owned the S. W. ¼ of the N. E. ¼ and the N. ½ of the S. E. ¼ of the N. E ¼ of section 10, township 12 N., of range 8 E., being in Tuscola county, Mich. On the 14th of January of that year he made his last will and testament as follows:

"I, Andrew Shultz, of Juniata, in the county of Tuscola, in the State of Michigan, being of sound mind and memory, do make and declare this, my last will and testament, in manner following, that is to say: I give and devise unto my daughter, Naamah Lucia Shultz, of my farm the following described tracts of land, namely: The north half of the south-east quarter of the north-east quarter of section ten, in township twelve north, of range eight east, in the county of Tuscola and State of Michigan; to have and to hold the said lands, tenements, and hereditaments, with the appurtenances, to her, the said Naamah Lucia Shultz, her heirs and assigns, forever.

"It is my last will that the remainder of my said farm and my personal property be sold at a reasonable time, and at a reasonable price, for the payment of all my just debts and funeral expenses; and that the personal property shall be sold and disposed of by my brother-in-law, Gearhart Kile; and that the real estate, namely, the south-west quarter of the north-east quarter of section ten aforesaid, be sold by my executor. I do hereby constitute and appoint my friend John Cole executor of this my last will and testament, and I also appoint him guardian of my said daughter and only child."

Afterwards, on the 26th day of December, 1876, he died, owning the whole of the N. E. ¼ of section 10. His will was admitted to probate in the probate court of Tuscola county, and John Cole was appointed as executor thereof. It does not distinctly appear from the record,

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which is very confusing and imperfect, who the heirs at law of Andrew Shultz were. The record of the probate court was offered in evidence, but it is not returned, nor are its contents stated, showing who such heirs were. We are left to presume that the daughter, Naamah Lucia Shultz, was the sole heir, and, if so, it is not perceived what use there was for a will. For the purpose of this case, we will assume that she was the sole heir. The record shows that she died, leaving as her heirs two children, viz., Helen E. Tucker and Leondard Sweet. Helen E. Tucker, on the 21st day of December, 1877, by deed executed that day, and recorded December 31, 1877, conveyed the whole of the north-east quarter of section 10, township 12 N., of range 8 E., to John S. Lewis for a consideration of $400.

The plaintiffs introduced in evidence a copy of the proceedings of the probate court of Geauga county, Ohio, showing that, upon February 6, 1878, Helen E. Tucker was, upon an inquest of lunacy, adjudged insane, and Cyrus A. Kellogg appointed her guardian. The order of appointment appoints Kellogg guardian of her person, but says nothing of guardianship of her property. On the same day a bond was filed, conditioned that Kellogg—

"Shall discharge with fidelity the trust reposed in him as guardian of the person and property of Helen E. Tucker, of the county and state aforesaid, and shall faithfully account with the probate court for the county of Geauga, aforesaid, for the management of the property and estate, together with the profits ensuing therefrom, to the order of said court or the direction of law, and shall in all respects perform the duty of guardian to the said Helen E, Tucker until discharged as the law requires."

Thereupon, on the same day, letters of guardianship were issued, of which the following is a copy:

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"THE STATE OF OHIO, } ss.
Geauga county. }

"*To C. A. Kellogg, of the county and state aforesaid, greeting:*

"*Whereas,* at a probate court held at the office of the judge of probate in the town of Chardon, within and for said county, on the 6th day of February, A. D. one thousand eight hundred and seventy-eight,—present H. K. Smith, judge of probate of said county,—it appearing necessary that a guardian should be appointed to take care of the property of Helen E. Tucker, who is demented and insane, of said county, aged sixty-five years, and I having the fullest confidence in your prudence, fidelity, and circumspect conduct, have, and by these presents do, constitute and appoint you, the said C. A. Kellogg, guardian of the estate of said Helen E. Tucker during her incapacity, unless sooner discharged by the court or the law. You are therefore hereby authorized and required to perform the duty of guardian to the estate of your said ward in all respects in conformity to the laws and statutes in such case made and provided.

[Seal] "H. K. SMITH,
"Judge of the Court of Probate."

It will be observed that the letters of guardianship appoint Kellogg guardian of the estate, and not of the person, of Helen E. Tucker during her incapacity.

On March 1, 1878, John S. Lewis conveyed the whole of the N. E. ¼ of section 10 to Cyrus A. Kellogg. This deed was recorded March 25, 1878, and purports to be in consideration of $800. On March 4, 1878, a petition not signed, but verified by Kellogg, was filed with the probate court of Tuscola county, alleging:

1. That he, Cyrus A. Kellogg, the legal guardian of said insane and incompetent person, Helen E. Tucker, is the owner of the following real estate to wit: An undivided half interest in the N. E. ¼ of section 10, in the township of Juniata, in said county,—which said interest in said real estate is worth $2,800; that said Helen E. Tucker has no other property whatever.

2. That it would be for the best interest of his said

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ward to have said real estate sold, and the proceeds thereof placed at interest.

3. That said ward is indebted to various persons to the amount of $1,400 or thereabouts, *and, in order to preserve her interest in said land, it is necessary to sell the same, and pay said indebtedness.*

Therefore he prays that he may be empowered and licensed to sell the real estate described according to the statute in such case made and provided.

A hearing was had before the probate court on the 1st day of April, 1878, and the court on that day, in consideration of the premises, ordered, adjudged, and decreed that Cyrus A. Kellogg, guardian as aforesaid, be and thereby was empowered, authorized, and licensed to sell, pursuant to the statute in such cases made and provided, the said real estate, "subject to all incumbrances, by mortgage or otherwise, existing at the time of the granting of this license, and *also subject to the right of dower and the homestead rights of the widow of said deceased therein.*" The court also ordered the guardian to give a bond in the penal sum of $4,000, with two sureties, and to give public notice of the time and place of such sale by posting up notices in three of the most public places in the township of Juniata, and also publish such notice in a newspaper printed in the county of Tuscola for six weeks successively next before such sale, and before making the sale to take the oath prescribed by the statute in such case, and further to make return of his doings to the court. Afterwards, on the 20th day of May, 1878, Kellogg filed a bond with Franklin Fairman and Simeon Wright as sureties, which was approved by the court on that day. He further gave notice of the sale to occur the 24th day of May, 1878, by posting notices in three public places in the township of Juniata on the 23d day of May, 1878, and made an affidavit of such posting on the 25th day of May, 1878. He also published a notice

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in the Tuscola Advertiser six weeks, as required. On the 24th day of May, 1878, he acted as auctioneer, and sold the premises to the highest bidder, to wit, Simeon F. Wright, for the sum of $2,200, and made a report of such sale, and of his doings under the license, to the probate court, who duly confirmed the same by an order made on the 12th day of August, 1878. The deed to Wright was not executed until the 13th of February, 1879, as will be referred to hereafter.

On May 20, 1878, John M. Cole, as executor of the last will of Andrew Shultz, deceased, conveyed to Cyrus A. Kellogg, of Claridon, Ohio, the S. W. ¼ of the N. E. ¼ of section 10, township 12 N., of range 8 E., for $800, as appears by said deed.

On February 13, 1879, the guardian's deed was executed by Kellogg to Simeon F. Wright, and was recorded the same day, and on the same day Wright reconveyed to Kellogg individually the same premises for the same consideration, viz., $2,200, and this deed was recorded on the 17th day of February, 1879. On March 12, 1879, Kellogg conveyed by warranty deed the N. E. ¼ of section 10 to Jacob Truax, the defendant in this suit, for $4,800.

On March 1, 1888, Helen E. Tucker died intestate, leaving four children, viz., Mrs. Winter, Mary Griffiths, Susan Strong, and August Shultz. August Shultz Tucker died leaving no issue, nor father nor mother, him surviving. On January 19, 1889, Jabez Griffiths and Mary E. Griffiths conveyed by deed to Martha Winter and Susan M. Strong, the plaintiffs in this suit, all of their interest in the land in question.

Cyrus A. Kellogg may possibly have acted throughout without fraud, and for the benefit of his ward, but this record does not show it. So far as he, as guardian, conveyed to Wright, and Wright immediately reconveyed to

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him, individually, for the same consideration, no title passed by the transaction. This case must be ruled by the case of *McKay v. Williams*, 67 Mich. 547. The whole record abounds with evidence of the efforts of Kellogg to get the legal title of this land in his individual name; and aside from the deed from Wright to him, which is void, his transactions would require very satisfactory evidence to explain why he assumed fiduciary relations with the estate of Helen E. Tucker, if he already had a valid title through Cole and Lewis.

Defendant's counsel urge that we should treat the deed to Lewis, and from him to Kellogg, as valid, inasmuch as it antedates the adjudication of insanity; but, aside from the facts apparent on the face of the deed, that Mrs. Tucker conveyed her whole interest in the undivided half of the N. E. ¼ to Lewis for $400, when it was worth more than 10 times that amount, we are only required to decide whether the charge of the court with reference to the guardian's deed to Wright, and from him back to Kellogg, is a correct instruction as to the law which should be applied to and govern the case. When the authority appears upon the face of the instruments, there is no presumption of honesty in a transaction by which the title of a *cestui que trust* is divested, and invested in the trustee.

The instructions of the court were erroneous, the judgment is reversed, and a new trial ordered.

The other Justices concurred.

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CHARLES MALONE AND JOHN MALONE v. SAMUEL G. M. GATES.

Logs and logging—Scale-sheets—Evidence—Mistake—Practice in circuit court.

1. Upon proof of the death of a scaler mutually agreed upon by the parties to a logging contract, his scale, if free from fraud or *gross* mistake, is admissible in evidence in a suit upon the contract, and is binding upon both parties.
2. The scale of a deceased scaler mutually agreed upon by the parties to a logging contract is presumed to be correct, fair, and honest, but if evidence is introduced tending to show the contrary, or that there is a *gross* mistake in the scale, the burden is upon the party claiming under it to establish its correctness.
3. The term "gross mistake," as used with reference to a log scale, is a mistake which is clearly shown to have left out some of the logs, or to have increased the scale by a mistake in the tally or in the addition of the amounts on the tally-sheets, or something of that nature, and not an honest error of judgment in the scaler.
4. Where the scale of a deceased scaler is received in evidence, it is competent for witnesses who were present when the scale was made to testify to the manner of its making, and what they did and knew about it, and what the scaler did and said while making it; and the declarations of the scaler against the correctness or honesty of his scale may also be shown.
5. Where logs which were not delivered at the time fixed by the contract, because "hung up" by reason of low water, were received the following year without any demur or protest on account of such delay, but payment was refused because the scale was disputed, such non-delivery is not a substantial breach of the contract.
6. The discretion of the trial judge in the enforcement of Circuit Court Rule No. 63, which provides that "one counsel only on each side shall examine and cross-examine witnesses," is held not to have been abused by allowing one of the attorneys for the plaintiffs to continue and complete the examination in chief

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of a witness after it had been commenced by the other attorney.[1]

7. Where, after a scaler mutually agreed upon by the parties to a logging contract had scaled a portion of the logs, his place was by agreement filled by another scaler, who scaled *all* of the logs, evidence of the reputation of the first scaler is immaterial in a suit involving the correctness of the last scale.

Error to Bay. (Cobb, J.) Argued June 20, 1891. Decided July 28, 1891.

Assumpsit. Defendant brings error. Reversed. The facts are stated in the opinion.

C. L. Collins, for appellant, contended:

1. Upon the question of the scale, counsel cited *Ortman v. Green,* 26 Mich. 209, 214, 215; *Hopkins v. Sanford,* 41 Id. 252.
2. The non-production of Lapham was not a basis for any legitimate argument on the part of the plaintiffs, particularly in the closing speech; citing *Seligman v. Ten Eyck,* 60 Mich. 269.

Van Kleeck & McCormick, for plaintiffs, contended:

1. In the absence of fraud or gross mistake, Smith's scale should govern; citing *Perkins v. Hoyt,* 35 Mich. 506; and his scale-bill, if shown to be correct, would of itself be evidence; citing *Skeels v. Starrett,* 57 Mich. 353.
2. The scale-bill of Smith was the record made by a common agent, and, after showing his agency and death, this record becomes evidence; citing 1 Greenl. Ev. § 154; and Smith's admissions and statements as to the scale, made at the time of the scale, are competent evidence; citing 1 Greenl. Ev. § 119.
3. A joint scale must govern, in the absence of fraud or mistake; citing *Busch v. Kilborne,* 40 Mich. 297.
4. Whether logs were merchantable was to be determined by the scaler agreed upon, and the parties are bound by the logs accepted by him; citing *Leonard v. Davis,* 1 Black, 476.
5. The contract provides for a log-scale, and not for a scale of the lumber at the mill, and this provision is as binding on the parties as other parts of the contract; citing *Hopkins v. Sanford,* 41 Mich. 243.

[1] See *Cook v. Insurance Co.,* 86 Mich. 554.

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MORSE, J. The parties to this suit entered into the following contract:

"ST. CHARLES, MICH., Jan 6, 1887.

"This agreement, made this day by and between Malone Brothers, of Taymouth, Michigan, of the first part, and S. G. M. Gates, of Bay City, Michigan, of the second part, witnesseth:

"That said first parties hereby sell to S. G. M. Gates about five hundred thousand feet of dry and green pine, now on skids on the east half of the south-west quarter of section 14, town 10, range 2 east, and the north-east quarter of section 11, township 10, range 1 east, except as hereinafter named, and deliver the same to said second party where he may direct in Saginaw river, for the sum of eight dollars per thousand feet ($8.00).

"It is agreed by first parties hereto that no dry or dead logs shall be taken by second party which shall measure less than seven inches in diameter at small end inside the sap, and it is further agreed that all timber shall be scaled merchantable for lumber.

"It is agreed that William S. Lapham shall scale the above logs, and his fee shall be paid equally by both parties hereto. The logs shall be delivered to said Gates or his assigns as early in the year as practicable.

"Said second party agrees to pay for the above logs the sum of eight dollars per thousand feet, as follows: $2.50 per thousand when scaled; three dollars per thousand feet when afloat in the river; and the balance, $2.50 per thousand feet, when all of the said logs shall be delivered to said Gates or his assigns.

"Said logs shall be marked by said first parties with a mark to be furnished by said second party at least twice on each end of each log, and as much more as will be plainly seen when the logs are afloat.

"MALONE BROS.
"S. G. M. GATES,
"Per. W. H. BROWN.

"Said Gates agrees to pay, of the $3.00 payment, $2.50 per thousand feet on the bank, and the balance, 50 cents per thousand feet, when afloat in the river.

"S. G. M. GATES,
"Per BROWN."

The plaintiffs brought suit in *assumpsit* in the circuit

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court for the county of Bay, counting specially on the contract, alleging that the defendant refused to perform said agreement by not paying them the sum of $506.89 when the logs delivered under it were on the river bank, and $101.13 when the logs were delivered to him in the Saginaw river, according to the terms of the contract; and averring that they had faithfully performed their contract in all things, and sold and delivered to the defendant 202,995 feet of logs under said agreement. The common counts were also added.

Defendant's plea was the general issue.

Plaintiffs had verdict and judgment for $567.70.

The dispute between the parties is mainly as to the scale of the logs,—the number of feet of merchantable lumber actually delivered to the defendant. It was also claimed by defendant that 491 of the logs delivered were dry and dead pine measuring less than 7 inches at the small end, and that there were about 700 logs that practically did not contain any merchantable lumber at all.

The testimony shows that W. S. Lapham, the scaler agreed upon in the contract, went upon the logs, and scaled about 1,200 pieces; but one of the plaintiffs found fault with his scale, and he refused to go on with his scale. By mutual agreement, one George W. Smith was selected in his stead, and went on and scaled the logs. At the time of the trial he was dead, but this fact did not appear in the case until it came out in the cross-examination of the defendant's witnesses. The logs so scaled consisted of 2,359 pieces cut by plaintiffs, and 1,429 pieces bought of one Ira Smith. When the logs were scaled by George W. Smith, he was accompanied by John Malone while scaling the logs cut by plaintiffs, and by Ira Smith while scaling the Smith logs. The logs were all delivered but two. The scale-bill made by

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Smith was introduced in evidence, and showed that the logs contained 202,755 feet.

Smith being mutually agreed upon as scaler, his scale, if free from fraud or gross mistake,—a mistake not depending upon the judgment of the scaler,—would be binding upon both parties. When the scale offered was proven to be the scale made by Smith, the presumption would be that it was correct, fair, and honest, and Smith being dead, it would be admissible without any evidence that it was correctly and honestly made. If its honesty or correctness was subsequently attacked, and any testimony introduced tending to show that it was dishonestly or unfairly made, or that there was gross mistake in it, the burden of proof would then be on the plaintiffs to establish its correctness. By gross mistake we mean a mistake which is clearly shown to have left out some of the logs, or increased the scale by a mistake in the tally or in the addition of the amounts on the tally-sheets, or something of that kind, and not an honest error of judgment in the scaler; for it is well understood and established that, in estimating the merchantable lumber in a given log, the judgment of scalers varies more or less, and that the scale cannot be made so accurate that all scalers will agree upon it.

It is contended that the court, in instructing the jury, left out the element of gross mistake; that he charged them that the scale of Smith must prevail if it was found to have been honestly made; that, in so charging, he also omitted another element necessary to a correct scale, to wit, that the scale must be according to the contract. We think the court did not leave out either of these elements. Speaking of the testimony of Brown and Chase, two witnesses of the defendant, who estimated the merchantable lumber delivered by plaintiffs, the court said:

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"If you find that there was no fraud or *gross mistake* in the scale made by Smith, then these estimates that were made by Brown and Chase pass for nothing; but those estimates made by them may be taken into consideration for the purpose of ascertaining that fact,—whether George W. Smith's scale is a fair statement about it or not. When that fact is once ascertained, and it is ascertained that the scale is correct, or substantially so, then these estimates pass for nothing. If you should ascertain that this scale is so much out of the way that it cannot be used as a scale, then these estimates may come in to help you ascertain, by means outside of the scale, what the amount of logs delivered actually was."

Again he said:

"And if you find that Smith was mutually agreed upon as the scaler, and that he did scale the logs, and there was no fraud or *mistake*, his determination should govern."

And he also distinctly told the jury that, if he scaled any logs that were not provided for in the contract, his scale would bind nobody; that he had no right to scale any dry logs under 7 inches inside the sap; and that, if he did so, it was the duty of plaintiffs to cull them out, and not deliver them to defendant. The court fairly and fully stated the law governing the scale of these logs, and committed no error in his instructions in this respect.

It was also competent for John Malone and Ira Smith to testify to the manner in which Smith's scale was made, what they did and knew about it, and what Smith said and did while he was scaling the logs; but the court erred in not permitting testimony to be given on behalf of defendant as to what Smith had said as to the manner in which he made the scale. If Smith had been alive, he would have been subject to cross-examination as to the way he made his scale. Being dead, his scale was admissible without his testimony; but we think, in such

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case, that his declarations against the correctness or honesty of his scale would be admissible.

It is alleged as error that John Malone was permitted to testify that the scale made by Smith was one agreed upon by Smith and himself. If any error was committed in the admission of this testimony, it was cured by the circuit judge in his charge. He instructed the jury that it was not competent for Malone and Smith to agree upon a scale that would bind defendant; that Smith's business was to measure and scale the logs, and not to agree upon anything, but to ascertain the correct scale by the application of his rule and judgment to the logs.

The court was requested by the defendant to instruct the jury that the failure of the plaintiffs to deliver all the logs in 1887 was a substantial breach of the contract. This was refused. The testimony showed that a portion of the logs were "hung up" that season, and not delivered until 1888, and that defendant received them at that time without any demur or protest that they were not delivered in time under the contract. The reason that defendant refused to pay plaintiffs for the whole number of logs delivered, upon Smith's scale, was because he disputed the scale, and not because a portion of them were not delivered until 1888. There was no error in refusing this request, or a similar one,—that, if plaintiffs had not excused the non-delivery of the logs in 1887, there was a substantial breach of the contract.

It is alleged as error that after Mr. McCormick, one of the attorneys for plaintiffs, had commenced the examination of a witness, and conducted it to a certain point, the court permitted Mr. Van Kleeck, another attorney for plaintiffs, to continue and complete the examination of the witness, in violation of Circuit Court Rule No. 63. We think the judge has some discretion in the enforce-

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ment of this rule, and that he did not abuse his discretion in this case.

The defendant undertook to show the reputation of Mr. Lapham as a scaler, but was not permitted to do so. This ruling of the circuit judge was correct. The parties, after the contract was made, selected another man; and, as was well said by the circuit judge in his charge, the reasons why the change was made were not material to the issue in this case. Lapham's scale was not in controversy, and his reputation not in question.

In this connection, it may be said that Mr. Van Kleeck, attorney for plaintiffs, traveled out of the legitimate issues in the case when he commented upon the fact that Mr. Lapham had not been produced as a witness, if, in such comments, he argued that the failure so to produce him had any bearing against the defense; but it does not appear from the record what Van Kleeck said, except that "he commented to the jury upon the fact that the defendant had not produced Mr. Lapham as a witness." There was no reason why Mr. Lapham should have been called as a witness by one party more than the other, or that he should have been called at all, as a matter of strict right or necessity.

We have noticed all the errors assigned that seem to us to demand discussion.

For the error in not admitting the declarations of Smith in relation to his scale, offered to be shown by the defendant by two witnesses, the judgment of the lower court is reversed, and a new trial granted, with costs of this Court to defendant.

The other Justices concurred.

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JACOB CRIBBS v. JOSEPH M. SOWLE.

Duress—Threats of criminal prosecution—Payment.

Where a man 72 years of age is threatened with arrest and imprisonment for an act which he denies committing, but on account of his age and ignorance of the law is so put in fear as to overcome his will, and cause him to pay the money demanded because of a fear that he will be unjustly imprisoned on the complaint of the person making the threat, and the testimony of witnesses produced by him, such payment is made under duress, and the money may be recovered as paid without consideration.

Error to Berrien. (O'Hara, J.) Submitted on briefs July 2, 1891. Decided July 28, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Spafford Tryon, for appellant, contended:

1. Whenever a person is so situated as to exercise a controlling influence over the will of another, or when there exists coercion, threats, compulsion, and undue influence, and the party so influenced yields to such pressure, and makes a disposition of his money or property differently than he would if such influence had not been exerted, no title is made under a possession acquired through such agencies; citing *Seiber v. Price*, 26 Mich. 519; *Gallaway v. Burr*, 32 Id. 332; *Lyon v. Waldo*, 36 Id. 347; *Wisner v. Bardwell*, 38 Id. 278; *Vyne v. Glenn*, 41 Id. 112; *Fosdick v. Van Arsdale*, 74 Id. 302; *Meech v. Lee*, 82 Id. 274

Theo. G. Beaver, for defendant, contended:

1. Duress exists only where one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will; citing *Hackley v. Headley*, 45 Mich. 574; 6 Amer. & Eng. Cyc. Law, 57.
2. To entitle the plaintiff to recover, it must appear that the money

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was paid upon a wrongful claim or unjust demand, under the pressure of actual or threatened personal restraint or harm, or of an actual or threatened seizure or interference with his property of serious import to him, and that he could only escape from or prevent the injury by making such payment; citing *Kraemer v. Deustermann*, 37 Minn. 469; *Radich v. Hutchins*, 95 U. S. 213; *Mayor v. Lefferman*, 4 Gill, 425; *Mays v. Cincinnati*, 1 Ohio St. 278.

MORSE, J. This is an action of *assumpsit* upon the common counts commenced in justice's court. On appeal to the circuit court for the county of Berrien, the circuit judge directed a verdict for the defendant.

The case made by the plaintiff was substantially as follows: He is a farmer about 72 years of age, and has lived in Bainbridge, in Berrien county, upon his present farm, for nearly 40 years. There is an orchard on his premises, and he makes and sells cider. He had cider in his cellar in the spring of 1889. The defendant had a mill not far from plaintiff's, and teamsters in his employ drawing logs to the mill. Plaintiff had a sick horse in July, 1889, and called some of these teamsters in to help him about his horse, as they were passing by his place. After they had assisted him to "swing up" his horse, he drew some cider, which he claims had acid in it to keep it from fermenting, and treated them with it. Plaintiff was something of a horse-doctor, and a few days thereafter one Penrod, who was working for defendant with his own team, brought one of his horses to plaintiff to treat for sickness. The horse was brought to his place about 4 o'clock in the morning, and died in about seven hours. On the second day thereafter the defendant came into plaintiff's yard, and we give the conversation between them in the language of the plaintiff:

"I was preparing to go to the hay-field. I had cut down quite a lot of clover. I was fixing my hay-rack. Says he, 'Is this Mr. Cribbs?' I told him that was my

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name. He says, 'I understand you have been selling my men cider, and in consequence one of my men got drunk Saturday before.' I cannot name the date of it,—it was the Saturday before the horse died. 'He run his horse, and caused his death, and I want pay for that horse. I want pay for the horse.' I told him that was a mistake; I never sold any of his men any cider in the world,—not a drop. Says he, 'You have, and I can prove it by six different witnesses that work for me,—men that work for me.' Says I, 'Who are they?' Says he, 'I cannot name them all, I have so many; a great many mills and so many men. I hire so many men I don't know their names.' He says, 'There are three at the mill, and there are three others that will swear they got cider.' I says, 'That is a mistake.' He says: 'Mistake or not, I want pay for that horse. My teams are lying idle. I have a contract, and that contract has about expired, and, unless I can keep my teams at work, I shall lose $1,000 on this contract. I cannot give you any time on it. I want it immediately,—right off.' I says: 'I don't see how you can make that claim. I have no knowledge of their getting any cider that would intoxicate any one, even to the most delicate child there was, or woman.' Says he, 'It has been done, and I have got hold of the man now that I have been looking for, and I want pay for it; my team has got to go to work tomorrow. I cannot run around any more. Unless you do, I shall send you up. I shall fine you, or cause you to be fined, and send you to Grand Rapids.' Says I, 'I don't understand the law.' He spoke in the first place, and says, 'You know as much about law as I do.' I says, 'I never had a case in my life, never had a lawsuit; I don't know anything about it.' 'Well,' says he, 'I have traveled over the State of Michigan about as much as any other man, and I know about as much law as most lawyers. I have had a great many lawsuits in my life-time.' Says he, 'That will be the least I can take, and the best I can do with you, and give you no time.' I told him I had no money by me.

"*Q.* You said something about his having you at Grand Rapids. What did he say about that?

"*A.* He would have me arrested and take me to Grand Rapids, in the U. S. court, and it would imprison me so long a time, and $500 fine.

"*Q.* Did he state how long a time?

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"*A.* Imprisonment?

"*Q.* Yes.

"*A.* I don't know as he came out on the time or years. I don't recollect that he did. He might have said a number of years. 'There will be no chance for you at all; it will be a sure thing.' Said he could prove it by three men down there. Wanted I should go down with him. I says, 'I have no time; my hay is in such a state I want to put my hands to work.' Says I, 'I cannot go.' 'Well,' says he, 'you better go.' 'Better go down,' says he, 'it will save a good deal of expense to you, probably.' So I went down."

Plaintiff admitted to Sowle that he gave the men some cider to drink, but protested that he did not sell it to them. Sowle told him that was enough to condemn him, as it was a sale. Plaintiff said he "could not see it in that light." Sowle replied, "I understand the law as well as most lawyers." Plaintiff and Sowle went down to the mill, and Sowle called up some of his men, and asked them in rotation, "Did you ever buy any cider of Mr. Cribbs?" and each one answered in the affirmative. Considerable more conversation between plaintiff and defendant took place between this time and the payment of the money; Cribbs trying to plead off or reduce the amount, and Sowle, insisting on the sum of $150 in money, or he would criminally prosecute the plaintiff for selling cider without a license. Finally Cribbs went down to Benton Harbor to get the money. While there he called upon Mr. Wiemer, a druggist, and who had been a sheriff or deputy-sheriff of the county, and asked his advice. Weimer said to him that he "guessed he had got in a boat." Plaintiff then went and got the money, and paid defendant $150. This is the money he is seeking to recover in this suit.

It was also shown by the testimony of Mr. Penrod, a witness for the plaintiff, that after his horse died the defendant came to Penrod, and asked him what he was

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going to do. Penrod replied that he hardly knew what to do. Then Sowle said, "There is just one way that you can get a horse." On being asked how that was, he said that, if Penrod would swear that he bought cider of Cribbs, he (Sowle) could go and scare $150 out of him. Penrod said that he could not do that, as he never bought any cider of plaintiff. Sowle said the other boys had, and they would swear to it. Penrod also testified that he was present when Sowle called the men up in the presence of the plaintiff, and asked them if they had purchased cider of Cribbs, and heard them answer, "Yes." Plaintiff was also corroborated, as to his conversation in his own yard with Sowle, by Mr. Parker, his hired man, who heard most, if not all, of the talk there.

The defendant admitted getting $150 of Cribbs, and that he obtained it by reason of making the charge to him that he had been selling cider to his men, but denied that he had threatened any criminal prosecution. There was no proof in the case that plaintiff's letting the men have cider had anything to do whatever with the killing of the horse belonging to Penrod. The money, under all the testimony, was received by Sowle without any consideration for its payment, except the settlement of a threatened criminal prosecution. But the circuit judge was of the opinion that the plaintiff had "failed to show anything like duress;" and said to the jury that.—

"Under his own testimony, there is nothing that can be called such fear as the law will recognize; and, once a man sees fit to enter into an agreement of that kind, he cannot afterwards invoke the aid of the court to rid himself of a place which he has himself been the cause of falling into. Your verdict, without leaving your seats, will be that you find in favor of the defendant."

The judge in his remarks to the jury, a portion only of which has been given above, laid stress upon the fact

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that plaintiff was remarkably strong and robust for one of his years, and had transacted more business than the average man in his walk of life; and also upon the further fact that plaintiff deliberated before the payment of the money, and counseled with a friend, "and paid the money with a full knowledge of all the facts."

The plain case is this: On Sowle's own showing, he has $150 of plaintiff's money without any consideration, and without the shadow of an excuse for a consideration. If the plaintiff's testimony is true, the money was extorted from him under the threat of a criminal prosecution in the United States court. He testified that he had sold cider by the barrel, and also sweet cider by the pitcher full and half gallon; but not to any of Sowle's men. He was ignorant of the law, and says that the reason he paid the money was that—

"Sowle's talk gave me a fright, scared me into it, not knowing anything about the law, never having any occasion to, and he claiming to be quite a lawyer himself, that he could make me. Thought I was compelled in my own mind to do it."

We do not think the plaintiff is debarred from recovering back this money so unjustly obtained from him. He had reason to fear a criminal prosecution when he was threatened with it, and confronted by three or four men who said that they had bought cider of him, and was informed by defendant that they would swear to it. Even if he had the average intelligence and business faculty of people in his walk in life, he can well be excused for thinking that he was in danger of being criminally prosecuted and perhaps jailed if he did not settle. He was ignorant of the law and had a horror of it; especially in the shape it was presented to him by the defendant. The fact that he consulted a friend, who told him he guessed he was in a boat, does not help the defend-

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ant any. If it has any bearing, it is in favor of the plaintiff's case. There is no doubt, from plaintiff's showing, that he was threatened with unlawful arrest and imprisonment; that it excited a fear in him that the threat would be carried into execution if he did not pay the money; that this fear was grounded upon the reasonable belief that the person making the threat had the means of carrying his threat into immediate execution; and that the threat operated so as to overcome the will of the plaintiff; and we think, under such showing, he was entitled to recover.

As was well said by Gordon, J., in *Jordan v. Elliott*, 15 Cent. Law J. 232:

"We are aware that neither under the rule of the civil nor common law, as formerly expressed, would there be sufficient to release Mrs. Elliott [in that case] from her contract; for, according to Blackstone, the threats to produce such an effect must be of such a character as to induce a well-grounded fear in the mind of a firm and courageous man of the loss of life or limb. And the rule of the civil law was of like import; the fear must be of that kind which would influence a man of the greatest constancy,—*metus non vani hominis, sed qui in homine constantissimo cadat.* * * * But, fortunately for the weak and timid, courts are no longer governed by this harsh and inequitable doctrine, which seems to have considered only a very vigorous and athletic manhood, overlooking entirely women and men of weak nerves. Pothier regards this rule as too rigid, and approves the better doctrine, that regard must be had to the age, sex, and condition of the parties, since that fear which would be insufficient to influence a man in the prime of life and of military character might be deemed sufficient to avoid the contract of a woman, or a man in the decline of life. Evans' Poth. Obl. 1, 18. And we think the opinion of Mr. Evans expresses the doctrine which is now approved by the judicial mind, both of this country and of England; that is, that any contract produced by actual intimidation ought to be held void, whether as arising from the result of merely personal infirmity, or from circumstances which might produce a like effect upon

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persons of ordinary firmness." See, also, And. Law Dict. p. 388.

It has been held by some of the courts that mere threats of criminal prosecution, when neither warrant has been issued or proceedings commenced, do not constitute duress (*Buchanan v. Sahlein*, 9 Mo. App. 552; *Higgins v. Brown*, 78 Me. 473; *Town Council v. Burnett*, 34 Ala. 400); and by others, that a threat of arrest for which there is no ground does not constitute duress, as the party could not be put in fear thereby (*Knapp v. Hyde*, 60 Barb. 80; *Preston v. Boston*, 12 Pick. 12). But these rules do not seem to have any regard to the condition of the mind of the person acted upon by the threat, or to take into consideration the age, disposition, or intellect of the person so threatened; and leaves the old, the ignorant, the weak, and the timid at the mercy of the bully or the scoundrel who operates upon their fears to extort money from them. Truly, to such an action as this the defendant, who, without semblance of any legal or moral right or claim, has scared money out of an old man, cannot well set up any defense of the policy of the law that it was the duty of the injured party to have resorted to the courts in the first place, or withstood the threat of being taken there until proceedings were actually begun, to defend himself from the extortion. Nor, in my opinion, is it the true policy of the law to make an arbitrary and unyielding rule in such cases, to apply to all alike, without regard to age, sex, or condition of mind. Weak and cowardly people and old and ignorant persons are the ones that need the protection of the courts, and they are the ones usually operated upon and influenced by threats and menaces.

This case should have gone to the jury, and if they found that the threat of criminal prosecution was made

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as claimed by plaintiff, and that he, on account of his age and ignorance of the law, was so put in fear that his will was overcome, and he paid this money, not of his own free will, but because of the fear that he would be unjustly imprisoned on the complaint of Sowle, backed by the testimony of the witnesses he had been confronted with, then the verdict should have been in his favor for the money so paid, with interest.

The modern doctrine of duress is established where actual or threatened violence or restraint contrary to law compels one to enter into or discharge a contract. Bouv. Law Dict. It is duress when there is a fear of imprisonment excited by threats. Will, Eq. Jur. 209. A threat to procure the arrest and imprisonment of one's son under a false and criminal charge, and reasonable ground to believe that such threat will be executed, probably constitute duress. *Schultz v. Culbertson*, 46 Wis. 313; *Meech v. Lee*, 82 Mich. 274. See, also, *Schultz v. Catlin* (Wis.), 47 N. W. Rep. 946; *Eadie v. Slimmon*, 26 N. Y. 9; *Adams v. Bank*, 116 Id. 613 (23 N. E. Rep. 7); *Green v. Scranage*, 19 Iowa, 461; *Taylor v. Jaques*, 106 Mass. 291.

The judgment is reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

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LEVI B. GLAZE v. THE THREE RIVERS FARMERS' MUTUAL FIRE INSURANCE COMPANY.

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Deed—Delivery—Recording—Fire insurance—Insurable interest.

1. Recording a deed raises a presumption of delivery to the grantee, which may be rebutted by proof of a contrary intent on the part of the party responsible for such recording; citing *Stevens v. Castel*, 63 Mich. 111.
2. The homestead right of a husband (if any) in buildings which he has insured before conveying the land on which they stand to his wife is not an insurable interest within the meaning of the charter of an insurance company, which provides that the interest of the assured at time of a loss must be that of owner or mortgagee.

Error to St. Joseph. (Loveridge, J.) Argued June 10, 1891. Decided July 28, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

John B. Shipman (*Orris P. Coffinberry*, of counsel), for appellant, contended:

1. As to what amounts to a delivery of a deed, counsel cited *Thatcher v. St. Andrew's Church*, 87 Mich. 264; *Burnett v. Burnett*, 40 Id. 361; *Pennington v. Pennington*, 75 Id. 600; *Lyon v. Lyon*, 76 Id. 610; and as to the necessity of acceptance by the grantee, see *Watson v. Hillman*, 57 Mich. 607.
2. A husband has an insurable interest in a homestead of which his wife holds the title; citing *Merrett v. Insurance Co.*, 42 Iowa, 13; *Reynolds v. Insurance Co.*, 80 Id. 563; *Horsch v. Insurance Co.*, 77 Wis. 4; and as to what constitutes an insurable interest generally in property, see Wood, Ins. § 263; May, Ins. §§ 76, 77; 11 Amer. & Eng. Cyc. Law, 312; *Harris v. Insurance Co.*, 50 Penn. St. 341; *Insurance Co. v. Deale*, 18 Md. 26; *Insurance Co. v. Barracliff*, 45 N. J. Law, 548.

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8. As to plaintiff's rights in the homestead after giving the deed, see *Hodson v. Van Fossen*, 26 Mich. 68; *Snyder v. People*, Id. 106; *Henry v. Gregory*, 29 Id. 68; *Jerdee v. Insurance Co.*, 75 Wis. 345; *Rowe v. Kellogg*, 54 Mich. 206; May, Ins. § 381.

R. R. Pealer and *David Knox*, for defendant, contended for the doctrine of the opinion.

MORSE, J. The plaintiff became a member of the defendant company, and insured his buildings and personal property therein, March 17, 1882. October 8, 1887, he deeded the land, 40 acres, and his homestead, upon which the insured buildings were situated, to his wife, Effie Glaze. The deed was recorded October 12, 1887. October 31, 1887, the buildings, and personal property within them, were burned by an incendiary fire. The defendant settled with him for the loss of the personal property insured, but refused to pay the insurance on the buildings because of this transfer to his wife. This suit is brought to recover such loss. The jury below found for the defendant.

The policy of insurance provides that it is made and accepted subject to all the provisions of the charter and by-laws of the company, a copy of which charter and by-laws appears annexed to the policy. Section 11 of the charter reads as follows:

"Any members, upon the sale of their property, may assign their policy to the purchaser, or secure a mortgage, on payment of one dollar; such assignment to be approved by the secretary, and indorsed on the policy. But the insurance upon such property shall cease upon such sale, unless so assigned; but they shall be holden for all assessments until such canceling or assignment is made."

Section 16 also provides that no loss shall be paid unless the assured or his assignee—

"Shall, at the time of the fire, have or hold a *bona*

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fide insurable interest in the property burned, either by *ownership or as mortgagee.*"

After the fire the plaintiff assigned the policy to his wife, but not with the consent of the secretary of the company. Before the commencement of this suit his wife reassigned it to him.

The question upon the trial in the court below properly turned upon whether or not this deed had been delivered before the fire. The plaintiff endeavored to show that he executed the deed without the knowledge of his wife, intending that it should not take effect until after his death, and that his wife did not know that he had made it. He went to the county-seat to get it recorded, and paid the fees therefore. It was returned to him by letter, and he testifies that it has ever since been in his possession. His wife was not sworn, and upon his cross-examination some facts and admissions were shown tending somewhat, at least, to contradict his assertions that his wife was ignorant of the execution of the deed.

We do not care to analyze the testimony. We think the question of the delivery of the deed was properly a question for the jury, under all the testimony, and that the court did not err in what he said in his charge in submitting such question to them. The court instructed the jury that it was not necessary that this deed should have been actually placed in the hands of the wife; that a manual delivery was not always necessary; that if the plaintiff executed the deed, and put it upon record for the purpose, and with the deliberate intention, of passing the title then presently to her, such act would constitute a valid delivery of the deed. The counsel for the plaintiff contend that this is not enough; that a deed cannot rest in intention merely, but, in addition, there must be a delivery of the deed itself to the grantee or

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some third person for such grantee's use and benefit; and that something must be done to indicate an acceptance of the grant upon the part of the grantee, as no person, against his will, can be made a land-owner.

We think there were circumstances drawn from the plaintiff upon cross-examination from which the jury might well presume that the wife knew all about the deed, and not only consented to it, but asked for it in payment of an indebtedness from her husband to her. It is true, the debt was an ancient one, but under our decisions it would have been a good consideration between them, even as against creditors; and there are intimations in the plaintiff's testimony that the object of it was for the purpose of protection to the wife, the premises conveyed being of more value than the homestead exemption. The recording of the deed was a presumptive delivery, which could be explained or rebutted, however, by the intention of the grantor, the plaintiff, as the act of recording was his own. *Patrick v. Howard*, 47 Mich. 40, 45; *Stevens v. Castel*, 63 Id. 111, 116. In this case the recording of the deed was admitted, and, if the jury found the intention of the plaintiff going with such act to be to pass the title to his wife, there was a sufficient delivery of the instrument. The wife has not disowned the deed, but since the fire has acted in some respects in ratification of it.

The plaintiff's counsel also insist in this Court that, the buildings being situated upon the homestead, the plaintiff, notwithstanding there was a sufficient delivery of the deed, had still an insurable interest in them, and that the sale or transfer forbidden by the charter means such a transfer as would leave no insurable interest in the policy-holder. But this view of the charter provision is not tenable. It is expressly stated in section 16 of

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that instrument, as heretofore shown, that the insurable interest which the assured must have at the time of the fire is that of owner or mortgagee.

The judgment is affirmed, with costs.

The other Justices concurred.

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ALEXANDER P. WAIT v. THE COMMISSIONER OF THE STATE LAND-OFFICE.

Swamp lands—Scrip—Homestead entry—Abandonment.

1. The term "scrip," as used in the statutes governing the disposition of "State Swamp Lands," so called, means the credit to contractors upon the books in the State Land-office of the number of acres of land, not particularly designated because not selected, to which they are entitled by reason of the acceptance of a portion or the whole of their contracts for the construction of roads or ditches, which scrip, though not otherwise evidenced, has been considered and treated as assignable.
2. It was not the intention of the Legislature to permit the holders of swamp-land scrip to enter or select for entry lands which had been occupied by an actual settler under a license issued by the Commissioner of the State Land-office under the provisions of Act No. 229, Laws of 1859 (How. Stat. §§ 5436–5441), and which had been forfeited and abandoned.

Mandamus. Submitted June 29, 1891. Denied July 28, 1891.

Relator applied for *mandamus* to compel respondent to issue a patent to him for 80 acres of swamp land. The facts are stated in the opinion.

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C. H. Rose and *Frank E. Robson* (*Isaac Marston*, of counsel), for relator.

A. A. Ellis, Attorney General, for respondent.

CHAMPLIN, C. J. The relator filed his petition in this Court praying for a *mandamus* to compel the Commissioner of the State Land-office to issue to him a patent for the S. ½ of the N. W. ¼ of section 24, town 38 N., range 3 W., situated in Cheboygan county, Mich.; said land being a portion of the land granted to the State of Michigan under the act of Congress approved September 28, 1850, popularly known as the "Swamp-Land Grant." This particular parcel of land was patented to the State by virtue of said act on October 4, 1875.

He alleges that the said parcel has not been purchased from the State, and was on the 18th day of November, 1890, and thence hitherto, the property of the State of Michigan; that by Act No. 130, Laws of 1883, the State of Michigan appropriated to the county of Livingston 10,000 acres of swamp lands in the Lower Peninsula, not otherwise appropriated, for the purpose of aiding in straightening the channel of Cedar river, and opening, widening, and deepening the same; that, acting under said act, the county contracted with one Edward W. Sparrow to perform said work, and, upon his fulfilling his part of the contract, said county, in consideration thereof, sold, assigned, transferred, and set over all its claims and rights to said 10,000 acres of land to said Sparrow, and he accepted the same; that upon November 17, 1890, Sparrow sold, assigned, and set over to the relator the right to select and receive 80 acres of said land by a written instrument, in words and figures as follows:

"For a valuable consideration, to me in hand paid, I

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hereby sell, assign, and set over to Alexander P. Wait, of Osceola county, Michigan, the right to select, under provisions of Act No. 130, Laws of 1883, eighty acres of State swamp land, not otherwise appropriated.

"EDWARD W. SPARROW.

"Dated Lansing, Michigan, November 17, 1890."

That upon the 18th day of November, 1890, the relator, in pursuance of said assignment, and complying in all respects with the provisions of law governing such applications, did select said above-described parcel, and request Roscoe D. Dix, State Land Commissioner, to issue to him a patent therefor under Act No. 130, Laws of 1883; but said State Land Commissioner did, without legal excuse, upon the 22d day of November, 1890, absolutely refuse to issue to the relator any patent therefor; and he prays that a peremptory writ of *mandamus* may issue out of and under the seal of this Court, commanding the said Roscoe D. Dix, State Land Commissioner as aforesaid, to issue forthwith to relator a patent for said above-described lands.

The Commissioner of the State Land-office filed his answer to said petition, admitting the several allegations in the petition, down to and including the request for the issue of a patent, and his refusal to do so; but denies that his refusal was without any legal excuse, and says, in that behalf,—

"That said tract of land was offered for sale at public vendue at the office of the Commissioner of the State Land-office on the 1st day of November, 1876, under the provisions of Act No. 97 of the Laws of 1869, the same being Howell's Statutes, sections 5444 to 5446, inclusive, as set forth in the petition of said petitioner, and hereinbefore admitted; and respondent, further answering, says that on the 24th day of October, 1878, said lot was licensed to Alexander Gero as a homestead under Act No. 229 of the Laws of 1859 and amendments thereto, the same being Howell's Statutes, sections 5436 to 5441, inclusive; and respondent, further answering in that behalf,

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says that the title to the said lands revested in the State of Michigan on the 24th day of October, 1890, for the reason that Gero had wholly abandoned said lands as a homestead for the space of two years; and respondent, further answering, says, that since the withdrawal of said lands for the benefit of said Gero, and since the reversion of said lands to the State of Michigan, as above set forth, the land has not been restored to the market, as provided by Act No. 21 of the Laws of 1873, the same being Howell's Statutes, sections 5249 to 5253, inclusive; and that because said lands have not been restored to market, as provided by said act, they were not subject to private entry or purchase by the said petitioner, or any other person; and that, therefore, the *mandamus* prayed in said petition ought not to issue."

Upon the hearing before us, other objections than these set up in the answer were urged as reasons why the relator is not entitled to the patent, based upon the language of Act No. 130, and upon existing laws with reference to the disposition of swamp lands. We do not consider these objections tenable, and shall confine our views to those set out in the answer.

Before proceeding to the discussion, it is proper that we should define what is meant and understood by the term "scrip." This term has been used in the statute respecting the disposition of swamp lands, but no legal definition or signification has been expressed in the statute. It has been the practice in the land-office of this State, where lands have been appropriated or granted for the purpose of aiding in the drainage of swamp lands, whenever the contractor doing the work has so performed any portion of it as to obtain its acceptance by the proper officer, and that officer has reported to the land-office, to credit the contractor upon the books of the office with the number of acres of swamp land to which such performance entitles him under the contract, and this credit is what is termed "scrip," although no certificate or other written evidence of the right of the

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party is issued. The lands, not having yet been selected, cannot be described or identified, and, until such selection is made, this credit, called "scrip," has been considered as assignable, in whole or in part, to other parties, and they have made selections, and, when so made and entered, the lands so selected are charged to the contractor upon the books of the office.

The sections of the statute referred to in the answer of the Commissioner read as follows:

"SEC. 5249. *The People of the State of Michigan enact,* That all lands of this State, which have been withdrawn from market for any purpose, or withheld from sale or pre-emption, in consequence of errors in books, or in consequence of marking sales or reservations upon maps, and all lands which have reverted, or may hereafter revert, to the State, by reason of a failure in any manner to make payment for the same, or by a failure to comply with the terms of any State road, railroad, or other grant or contract of this State, to or with any person or corporation, or by reason of a failure to comply with the conditions of any license or homestead act, shall not be subject to private entry or purchase, either with cash or scrip, until public notice of the restoration of such lands to market shall have been given in the manner hereinafter prescribed.

"SEC. 5250. The Commissioner of the State Land-office shall be required to advertise for four successive weeks, in a newspaper published in the county where such lands are situate, if there is one published therein, and, if not, then in some newspaper published in a county nearest to that in which said lands are located, and shall also forward a written or printed notice by letter, mailed and properly directed to each settler and purchaser of lands held by him under any of the laws of the State, and included in the list so advertised, that at a time certain, at his office in the city of Lansing, naming the day of the month and the hour, not less than thirty days from the date of the first insertion of such advertisement, the particular lands, giving the descriptions thereon, will be restored to market.

"SEC. 5251. It shall be the duty of the Commissioner to cause the notice of the restoration of such lands to

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market to be publicly proclaimed from the front door of the land-office in Lansing, one hour before the time of such restoration; and, in all cases where there are two or more applicants for the same tract of land present at the time of its restoration to market, the Commissioner shall immediately offer and sell the said tract in the smallest subdivisions of which the same is susceptible, not less than forty acres (unless the tract should be a fractional section or fractional part of a section containing a less number of acres), to the highest bidder: *Provided*, no bid for any such tract shall be received by the Commissioner unless the price offered shall be equal to the minimum price of such land as fixed by law.

"SEC. 5252. All entries or sales of any lands such as are hereinbefore referred to, or of lands now held in trust by the State which may hereafter become the property of the State by virtue of any of the provisions of such trust, if such entries or sales be permitted or made in violation of any of the provisions of this act, shall be absolutely void, and the certificate issued thereon shall vest no title in the person or corporation entering or purchasing the same.

"SEC. 5253. All acts or parts of acts contravening any of the provisions of this act are hereby repealed."

The lands licensed to Gero did not revert until the forfeiture had been declared, and this was not done until October 24, 1890, and on November 18, 1890, being 25 days after the forfeiture was declared, the relator attempted to select this land with scrip, under Act No. 130 of the Laws of 1883. He presented his selection and applied for a patent. He based his claim on the ground that the land was swamp land which belonged to the State, and was unappropriated, and consequently subject to selection, under Act No. 130.

The only question is whether Act No. 21, Laws of 1873, being sections 5249 to 5253 of Howell's Statutes, applies to the land in question, and to the scrip under which the selection is sought to be made. Alexander Gero was licensed by the Commissioner of the State Land-office to enter upon and occupy the land in ques-

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tion as a settler or occupant under the provisions of Act No. 229, Laws of 1859, and the amendments thereto, being compiler's sections of Howell's Annotated Statutes, 5436 to 5440. The question of the forfeiture of such lands by the Commissioner, and the object of the statute in granting licenses to settlers upon swamp lands, is commented upon in *Hedley v. Leonard*, 35 Mich. 71, and it was there held that the lands did not revert to the State until the forfeiture had been declared. It was also held that such licensee had rights of which he could not be deprived except by proceeding in strict accordance with the statute; and it was said that—

"It is the express policy of the State to encourage the improvement of swamp lands by such licensees, and it is a perversion of that policy to encourage interlopers to enjoy the fruit of other men's labors. It never was designed that any one should be ousted unless he has manifestly failed to perform his obligations, and determined to abandon his holding."

It was in furtherance of this policy of the State that the act of 1873 was passed, in which it is expressly declared that—

"All lands which have reverted, or may hereafter revert, to the State, by reason of a failure in any manner to make payment for the same, or by a failure to comply with the terms of any State road, railroad, or other grant or contract of this State, to or with any person or corporation, or by reason of a failure to comply with the conditions of any license or homestead act, shall not be subject to private entry or purchase, either with cash or scrip, until public notice of the restoration of such lands to market shall have been given in the manner hereinafter prescribed."

The next section prescribes the notice which shall be given, and requires the commissioner to forward a written or printed notice by letter, mailed and properly directed to each settler or purchaser of lands held by him under any of the laws of the State, giving notice of

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the day, month, and hour when such lands shall be restored to market. We conceive that the object of this statute is to enable a person who has had the misfortune to fail to complete his purchase under a license, for any cause, to appear at the time and place of sale, and bid thereon. The statute expressly denies the right of private entry or purchase, either with cash or scrip. The relator was therefore prohibited from entering this particular parcel of land with scrip.

It is urged that Act No. 130 made no exceptions; that all that was required by that act was that it should be swamp lands in the Lower Peninsula not appropriated; and that it operated as an implied repeal of the act of 1873, above quoted. But I do not think so. I think these acts should be construed so as to be in harmony with each other, if possible, and I do not think it was the intention of the Legislature to permit persons having credit upon the books of the land-office to enter lands or select for entry lands which had been occupied by actual settlers, and which had been forfeited and abandoned. The whole spirit of the enactments for the protection of settlers and homesteaders would be violated by such construction. In this case Gero entered this land in 1878 as a homestead, and the record says that he had abandoned it for two years prior to 1890. For all that is known or disclosed, he may have made valuable improvements on this property. He is not a party before us, and the forfeiture itself, as to him, may not be effective. At any rate, as to such lands licensed to homesteaders, we think the statute of 1873 applies, prohibiting a private entry, either for cash or scrip.

We think the *mandamus* should be denied.

The other Justices concurred.

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THEODORE S. NICHOLS ET AL. v. THE ANN ARBOR & YPSILANTI STREET RAILWAY COMPANY.

Street railways—Additional servitude—Injunction.

The street-railway act of 1855 as amended (chapter 94, How. Stat.) confers no power upon a company organized under it to construct, maintain, and operate a railroad along the side of the traveled portion of a public country highway, with the consent of the township authorities, upon a road-bed not conforming to its grade, but made by means of cuts and fills, without compensation to abutting land-owners, at whose suit equity will perpetually enjoin the maintenance and operation of such a road.

Appeal from Washtenaw. (Peck, J., presiding.) Argued July 1, 1891. Decided July 28, 1891.

Bill to enjoin the construction and operation of a street railway. Complainants appeal. Decree reversed, and perpetual injunction granted. The facts are stated in the opinion.

A. J. Sawyer (*J. F. Lawrence,* of counsel), for complainants.

B. M. Thompson, for defendant.

[The authorities are so fully collected and reviewed in the case of *Detroit City Railway v. Mills,* 85 Mich. 634, that a summary of the briefs of counsel is omitted.—REPORTER.]

LONG, J. The bill in this case is filed to restrain and enjoin the defendant from placing ties and laying rails, and operating its railway, over and along the complainants' land, situate in the public highway, and from

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running cars and trains of cars propelled by steam, or any other motive power, upon said highway, along and in front of complainants' premises.

The bill sets forth, substantially,—

That two of the complainants reside in the township of Ann Arbor, Washtenaw county, and that the complainant Lucy L. Granger resides in Bay City; that they are the children and only heirs at law of Erasmus D. Nichols, deceased, who was the owner in his life-time of certain lands situate in that township, having a frontage on the highway of about 40 rods, and that complainants, as such heirs at law, are the owners of said lands.

That on the 30th day of August, 1890, the defendant railway company filed in the office of the Secretary of State a paper purporting to be the articles of association of the Ann Arbor & Ypsilanti Street Railway Company, and that said company proposes to run a railroad from Ann Arbor to Ypsilanti, upon and along the south side of the public highway between said cities called the "Ann Arbor and Ypsilanti Road," and that it has graded along the south side of said road from the terminus of said road, in the city of Ypsilanti, to the city limits of the city of Ann Arbor, and laid the ties and railroad track or iron thereon, excepting a few rods along and in front of premises owned by one John A. Bohnet in the township of Pittsfield, and the premises of the complainants, which lie adjacent to the city of Ann Arbor; that said grading, placing of ties, and laying of the iron is on the south side of said highway nearly the whole distance, except from what is known as the "stone school-house" to the limits of said city of Ann Arbor, over which last distance it is on the westerly side of said highway; that said grading along the line of said highway comes within two or three feet of the fences on the south and west sides of the same; that said defendant has completed the construction of said road, except along the premises of the complainants and said Bohnet, and purposes and intends, when the same is completed, to run trains of cars thereon, drawn by steam-engines, for the purpose of conveying passengers and freight upon, along, and over said railway. Complainants show by their bill, and charge, that the defendant, under its articles of association, if the same are valid, has the right to use on said

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railroad an engine or motor to be operated by steam; that under the said articles, if the same are legal and binding, the said company is not only permitted to carry passengers, but is authorized to use the said road for the transportation of freight and property.

The complainant Theodore S. Nichols shows and charges in the bill that one William Campbell, claiming to act for the defendant or some other corporation, applied to him for his consent and permission to build its said road upon and along said highway, and that he signed some paper which was then and there presented to him by the agent of said company, giving his consent to the building of some railway; but he avers that the agent falsely and fraudulently represented to him that the proposed road was simply a street railway, and that the motive power to be used thereon was to be either electricity or animal power, and, in reliance upon the statements so made by the agent of the defendant, he subscribed the paper presented to him, the contents of which he is now unable to state, but he avers that by reason of said false and fraudulent representations the said paper is and of right ought to be null and void, and of no binding force and effect whatever.

The complainants Ella E. Nichols and Lucy L. Granger charge that they have given the defendant no consent or permission to construct and operate said railway in said highway in front of their premises, and that said railway has obtained no lawful consent of the supervisor and commissioner of highways of said township, but that the same was obtained upon the false and fraudulent representation that the motive power to be used by said street-railway company was to be either animal or electricity, and that, therefore, whatever consent was given by said commissioner and supervisor was of no binding force or effect whatever; that the paper purporting to give the consent of said supervisor and commissioner does not in any particular comply with the statute requiring the consent of the supervisor and commissioner, and that the acts and doings of the defendant, as set forth, have been done without warrant of law, and are not only an invasion of the rights of the complainants, but are also an unlawful appropriation of the public highway for railroad purposes; that the statute under which said pretended company was organized is no longer in force, and that there is no statute in this State which authorizes

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the formation of any such corporation as the said defendant claims to be; that the defendant, as a corporation, has no legal existence, and has no right to enter upon any of the highways of this State, and build thereon a railroad of any description; that the paper purporting to be the consent of the township board of said township to build said road was not executed in accordance with any action theretofore taken by said board, nor was the same made and executed at any meeting of said township board.

Complainants claim by their bill that the construction and operation of said railway will cause a serious and lasting damage and injury to their said real estate, and that the corporation is not personally responsible for any judgment for damages; that the location of said track within two or three feet of the road fence, upon the west line of said highway, makes it necessary for them, in order to get into their fields or to their house and barns situate thereon, to cross the track of said railway; that their house fronts upon said highway, and is only a distance of 90 feet from the line of said highway, and that it will be impossible to hitch horses or other animals in front of their said premises without danger of their being killed or injured by the cars of the defendant; that the construction and operation of said railway will largely decrease the value of their real estate, and if allowed to be constructed and put into operation, will occasion them irreparable injury; that the operation of said road along said highway will not only be an injury to their property, but will occasion serious and lasting injury to the entire length of the road over which said railway runs; that they are forced to come to Ann Arbor or Ypsilanti to market all the produce and crops from said farm; that the only highway over which they can pass to either city is this highway, and, if defendant is permitted to complete the construction and continue the operation of said road along said highway, it will be and remain a continuous cause of injury and damage to complainants, and a permanent obstruction in said highway, and an object of fright to their teams while engaged in marketing their produce and crops from said farm; that the construction and operation of said railroad will decrease the value of complainants' property at least $3,000.

Complainants further charge that the defendant intends

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to proceed at once to complete the construction of said road along said highway, and to place thereon ties and railroad iron, and to run over and upon the same steam-engines and cars for the transportation of passengers and freight thereon, as often as one train every hour.

Defendant demurred to a portion of this bill, and answered as to the remainder. The causes of demurrer are:

1. That it appears upon the face of the bill that the defendant has been and is duly incorporated.
2. That the court has no jurisdiction in the cause to hear and determine the question of the incorporation of the defendant.

By way of answer, the defendant admits—

That it has graded its road-bed from a point in the city of Ypsilanti, near the Michigan Central depot, to the south boundary line of the city of Ann Arbor; that all of said road within the city of Ypsilanti is completed, and nearly the whole of said road from Ann Arbor to Ypsilanti has been tied and ironed, and is now ready to be operated as a street railway.

Defendant denies that its said railroad is in any correct sense a commercial railroad for the transportation of passengers and freight, upon which ordinary steam-engines, freight and passenger cars, are to be used and operated, and says it is strictly and simply a street railroad for the conveying of passengers to and from the cities of Ann Arbor and Ypsilanti and intermediate points, and that the insertion in its articles of incorporation of authority to carry freight was designed merely to authorize defendant to carry light articles of merchandise for the benefit and accommodation of the passengers and others who may desire to have light articles of merchandise, purchased in Ann Arbor or Ypsilanti, transported to their homes in said cities, or on the line of said road; that the motor to be used on said road is no larger than a street-railway car, makes a less noise in operation than the electric car with overhead wires, emits little or no steam or smoke, and is as unobjectionable in every way as an ordinary street railway propelled by animal power.

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Defendant further claims that it has obtained the right to use said highway from the proper authorities; that it has also obtained a right of way from all the persons owning land upon the said highway on the south and west sides thereof, except for a distance of about 40 rods across lands owned by one John A. Bohnet; and it admits that it obtained said right of way for the construction and operation of a street railway, and not for a commercial road.

Defendant further says that it obtained the right of way and consent to construct and operate its said road in said highway, across the lands described in said bill as complainants' lands, from the said complainant Theodore S. Nichols, and it denies that in obtaining such consent and right of way it made any false representations whatever to said Theodore S. Nichols; that said complainant Theodore S. Nichols, in giving the defendant such right of way and consent to construct and operate its said road, did so without restriction or limitation as to the rights of any other person who was an owner of said premises in common with himself; and that, under and by virtue of such consent and right of way so given by the complainant Theodore S. Nichols, it has a right of way for the construction and operation of its said road as to all of the complainants.

The defendant denies that the construction and operation of said road will cause any damage whatever to the lands described in said bill of complaint, but says that they will be greatly increased in value by the construction and operation of said road. Defendant further claims that it has expended in grading its road, tieing and ironing the same, or become liable for, over $50,000, and that all of such expense has been incurred by the defendant, acting upon the consent and agreement of the said Theodore S. Nichols, giving defendant the right of way across the premises described in the bill, and that, unless it is permitted to complete and operate its said road, it will thereby suffer great loss and damage, and that said loss and damage will amount to over $10,000.

The testimony in the case was taken in open court before his honor Judge Peck, then sitting in that court, who, upon the conclusion of the case, entered a decree

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dismissing complainants' bill, but without prejudice to the right of the complainants to proceed in an action for damages.

From this decree complainants appeal.

The defendant corporation was organized under chapter 94, How. Stat. Its articles of association recite that the corporators desire to become incorporated under the provisions of chapter 94, How. Stat., being Act No. 148, Laws of 1855, as amended by Act No. 91, Laws of 1871, entitled "An act to provide for the construction of train railways," as added to by Act No. 14, Laws of 1861, as amended by Act No. 188, Laws of 1867, which provides for—

"The incorporation of persons for the constructing, owning, maintaining, and operating of train railways or roads for the conveyance of persons or property, to be operated by horse or other animal power, or by pneumatic or other motive power, or by any combination of them, or by steam, as shall be determined by the board of directors, and for the purpose of constructing and operating railways through the streets of any town or city in this State, and to fix the duties and liabilities of such corporation."

Chapter 94, as it originally stood prior to the amendments, was Act No. 148, Laws of 1855, and, as originally passed, provided for the incorporation of train railway companies. In 1861, the Legislature, by Act No. 14 of that session, so amended the chapter that it provided for the organization of companies under the act to construct and operate railways in and through the streets of any town or city within the State. The act was again amended in 1867 by adding three new sections, to stand as sections 38, 39, and 40. Act No. 188, Laws of 1867. By section 40 it was provided that—

"The cars on the street railway of any company organized under this act may be operated by steam, or by any

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power other than animal power, whenever the municipal authorities of the city where such railway is situated shall authorize the same."

The question of the incorporation of street railways under this act came before this Court in *Taylor v. Railway Co.*, 80 Mich. 79, and in *Detroit City Ry. v. Mills*, 85 Id. 634. In the last named case the constitutionality of this chapter and the several amendments was questioned, and the act upheld. We shall not, therefore, discuss the constitutional questions raised as to the act, or the proper and legal organization of the defendant company. If the defendant company is not legally and properly organized under the act, or if the company is attempting to exercise corporate franchises not conferred by the act, it is a matter between the defendant company and the State. The mere usurpation of corporate authority does not confer upon an individual the right to bring suit to restrain an unlawful exercise of authority. If the State chooses to waive it, or permit the action, no others can complain, so long as personal or property rights of the individual are not invaded or affected.

The two principal questions raised by complainants' counsel are:

1. That the use of steam as a motive power is an additional burden or servitude upon their lands.
2. That the mode or manner of construction of the road-bed constructed by the defendant company is also an additional burden or servitude upon their lands.

The testimony shows that the motor used is what is known as "Porter's Noiseless Motor;" that it is operated by steam, and inclosed like an ordinary street-car, and about the same size, and makes less noise than an ordinary electric street-car with overhead wires; that it is so arranged that the steam makes a continuous circula-

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tion, making no noise by emission of steam, and that the smoke is consumed.

It was held in *Detroit City Ry. v. Mills*, 85 Mich. 634, that an ordinary street railway is not an additional burden or servitude where the fee of the street is in the abutting owner, and there is almost a *consensus* of judicial opinion in this direction. *People v. Kerr*, 27 N. Y. 188; *Clinton v. Railroad Co.*, 24 Iowa, 455; *Railroad Co. v. O'Daily*, 13 Ind. 353; Dill. Mun. Corp. § 723 (574).

It was also held in that case by this Court that the use of electricity as a motive power did not create an additional servitude or burden upon the lands of the abutting owners. The manner in which the road of the defendant company is to be operated by the use of this steam motor, as it is, is no more of a burden or servitude upon the lands of the abutting owners than an electric car with its overhead wires. It is no more obstruction to the street, and no more of an object calculated to frighten horses passing and repassing upon the highway. Section 40 of the act, above quoted, expressly provides for the use of steam as a motive power upon street railways operated in cities, whenever the municipal authorities authorize it. In *Briggs v. Railroad Co.*, 79 Me. 363 (10 Atl. Rep. 47), the use of steam as a motive power upon street railways was expressly recognized. We think the complainants are not entitled to the relief asked for by their bill by reason of the use of steam as a motive power in the manner in which it is shown the defendant proposes to use it.

It appears that before the defendant company was organized a company known as the "Ann Arbor, Ypsilanti & Detroit Street Railway Company" had procured from the township board of the township of Ann Arbor the right and privilege to construct, maintain, and oper-

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ate a street railway over this highway, to the rights of which company the defendant claims to have succeeded, and also claims the right to construct and operate this street railway by reason of permission, granted to it in writing by the supervisor and commissioner of highways of said township, to locate, establish, construct, and maintain its road over this highway, and to use thereon animal, motor, or electric power. Some question is raised by complainants' solicitors in this record as to the authority thus granted. Without entering upon that question at length, it is sufficient to say that we are satisfied that there was proper authorization by the township to construct, maintain, and operate this road by the defendant, and, unless the complainants are in some manner affected in their private and property rights, the defendant cannot be interfered with by them in the operation of its road.

The second question raises the important point in this case, and that is the manner or mode in which the defendant's road is constructed in and along the highway. A street railway, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise so constructed that the public are not excluded from the use of any part of the street as a public way, carrying passengers, stopping at street crossings to receive and discharge them, is a street railway, whether it be operated by horses or electric power, or by steam-motor, such as is shown to be used by the defendant in this case. The testimony shows, however, that, since issue was joined in this case, the defendant company has completed the construction of its road, which had been mostly completed at the time the bill was filed; that the road, as constructed, runs along upon the highway within two or three feet of the road fence upon complainants' land; that the road-bed does not conform to the grade

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of the street, nor pass over and along the surface of the ground next to the fence, but that the grade for the road-bed is made by cuts and fills. In some places the cuts are two feet in depth, and the fills as great. Ditches are dug along the side of the road-bed on either side. Upon the road-bed so constructed ties are placed to the number of from 2,000 to 2,800 to the mile. Upon these ties is placed a T-rail, such as is ordinarily used in the construction of a railroad for commercial purposes, except that the T-rail is somewhat lighter. The complainants claim that this is a use of their property not warranted by the act under which the company is organized, and a taking of their private property for public uses without compensation; that it depreciates the value of their lands, in that they are unable to pass over from the highway to their lands without crossing this road-bed at great inconvenience; and that they are unable to hitch horses or other animals along the highway fence. The complainants' lands have a frontage on the highway of about 40 rods.

The act under which the defendant is incorporated confers no power upon it to construct, maintain, and operate such a road without compensation to the property-owners abutting thereon, and the township authorities could confer upon the defendant no such power. It is from its mode of construction in all essentials a commercial road, and not an ordinary street railway. It is not constructed as street railways are usually constructed, on a level with the surface of the street, so that vehicles may pass and repass over it. As constructed, it blocks up the highway so far as the complainants' use of it is concerned in going to and from their premises, and is an additional burden upon their lands.

The rule is well established in this State that the dedication of a street to the public does not authorize it

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to be used for an ordinary railroad track, and the municipal authorities cannot authorize it to be so used without compensation to the adjacent owners. *G. R. & I. R. R. Co. v. Heisel*, 38 Mich. 62, 47 Id. 393; *Riedinger v. Railroad Co.*, 62 Id. 29. It was said by Mr. Justice COOLEY, in *G. R. & I. R. R. Co. v. Heisel, supra:*

"A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel, instead of constituting an embarrassment. * * * It is enough that the use of the street for a city railway is a proper use, and therefore a lawful use;" citing *Railroad Co. v. Railroad Co.*, 35 Barb. 364; *Railroad Co. v. Railroad Co.*, 33 Id. 420; *People v. Kerr*, 27 N. Y. 188; *Railroad Co. v. O'Daily*, 12 Ind. 551; *Brown v. Duplessis*, 14 La. Ann. 842; *Elliott v. Railroad Co.*, 32 Conn. 579; *Hobart v. Railroad Co.*, 27 Wis. 194.

Speaking further in that case, the learned Justice said:

"But we cannot say the same in the case of the ordinary railroad. * * * In such a case it cannot be questioned that the laying of the railroad track in the highway without first legally appropriating the land for the purpose, and without making compensation, is a legal wrong to the adjacent owner; the track as to him is wrongfully laid."

In *Riedinger v. Railroad Co.*, 62 Mich. 29, a bill was filed to restrain the defendant company from constructing a railroad over and across Front and Superior streets in the city of Marquette. The bill was dismissed in the court below, and complainants appealed to this Court, where, upon a hearing, a decree was entered for a perpetual injunction against this use of the streets, unless within six months measures should be taken to condemn the complainants' rights in the streets, and compensate them therefor.

Defendant contends, however, that the complainant

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Theodore S. Nichols is estopped from making this claim by reason of a release of the right of way over complainants' premises. The writing is not put in evidence, and complainant contends that it was procured by fraudulent representations; that at the time of its execution the defendant company represented to him that it was to build a street railway similar to that in the city of Ann Arbor; and upon this understanding he consented to the construction of the road in front of his premises. We think the complainant borne out by this record in that claim, and that the complainants are not estopped from insisting upon their rights here to have a road—if one is to be built at all by defendant—such as was represented to him would be built; that is, an ordinary street railway, conforming to the grade of the street.

In view of these facts as to the *mode* in which the road is constructed, we are satisfied that the complainants are entitled to the injunction prayed. The decree of the court below will be reversed, and a decree entered in this Court granting a perpetual injunction to the complainants, enjoining and restraining the defendant corporation from maintaining and operating its road in the *manner* in which it is constructed across the complainants' premises.

Complainants will recover the costs of both courts.

GRANT, J., concurred with LONG, J.

MORSE, J. I think this case should be reversed, but I do not think that the law, as yet, has been settled in this State that an electric street railway is not an additional burden to the highway, and I am satisfied that a steam railway is such a burden.

The injunction should be granted as prayed.

MCGRATH, J., concurred with MORSE, J.

CHAMPLIN, C. J. I concur in the reversal upon the

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ground stated in the opinion of Mr. Justice LONG, but I do not concur in that part of the opinion which states that it is settled law in this State that a street railway, operated by steam or electricity, is not an additional servitude upon a street or highway.

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OLNEY H. RICHMOND, ADMINISTRATOR OF THE ESTATE OF CADY W. SHERWOOD, DECEASED, v. THE CHICAGO & WEST MICHIGAN RAILWAY COMPANY.

Railroad companies—Accident at crossing—Absence of flagman—Contributory negligence—Damages.

1. Plaintiff's intestate, a street-car driver, was killed at a railroad crossing by a collision with nine detached freight cars, running at the rate of from 8 to 10 miles per hour, without any warning of their approach other than the noise made in running. The flagman was not at his usual post of duty, and gave no warning of danger until the horse was upon the crossing. After leaving another railroad crossing, about 185 feet from the one where the accident occurred, the driver could not have seen the approaching freight cars until within about 20 feet of the crossing where he was killed, and he did not look in the direction from which the cars were approaching, after reaching said point, until his horse was upon the track. And it is held that the question of his negligence (that of the defendant being apparent) was for the jury, who were to determine whether, under the circumstances, the driver had the right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from him, as an assurance of safety; and, if they found that an ordinarily prudent man would have acted as the driver did, the plaintiff could recover.
2. In an action against a railroad company under How. Stat. §§ 3391, 3392, for the negligent killing of the plaintiff's intestate, the damages recoverable are limited to the pecuniary injury sustained by the persons entitled to share in the distribution

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of his personal estate (*Van Brunt v. Railroad Co.*, 78 Mich. 530; *Hurst v. City Railway*, 84 Id. 539); which distribution is governed by the statute existing at the time of the death of the intestate.

3. The following general propositions are summarized from the majority opinion of Mr. Justice MORSE:

a—It is not the law of this State that, under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways and to listen for approaching trains; citing *Cooper v. Railway Co.*, 66 Mich. 266.

b—A traveler is not compelled, under all circumstances, to stop before crossing the track, if his view is obstructed from one way. He is required to take such precaution as an ordinarily prudent man would under like circumstances, and whether he did use such care is generally a question for the jury; citing *Guggenheim v. Railway Co.*, 66 Mich. 157, 158.

Error to superior court of Grand Rapids. (Burlingame, J.) Argued October 24, 1890, and reargued May 20 and 21, 1891. Decided July 28, 1891.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Smith, Nims, Hoyt & Erwin (*M. J. Smiley*, of counsel), for appellant, contended:

1. The family to whose support Sherwood contributed in his lifetime consisted of his mother, two sisters, a brother, and himself. At the time of the trial one of the sisters was supporting herself, and the brother was supporting himself and contributing to the maintenance of the family. What, if anything, the younger sister was able to do towards her own support, or for what period, or to what extent she is likely to require aid in the future, was not shown; hence the testimony showing the amount of Sherwood's contribution could not furnish any proper measure of damages; citing *Railway Co. v. Bayfield*, 87 Mich. 205; *Cooper v. Railway Co.*, 66 Id. 261; *Balch v. Railroad Co.*, 67 Id. 396; *Van Brunt v. Railroad Co.*, 78 Id. 530; *Hunn v. Railroad Co.*, Id. 513.

2. The action of the trial judge in refusing defendant's requests, and in charging the jury in accordance with the instructions to which errors are assigned, was directly in conflict with the well-established law in this State, that "the track itself is a

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warning of danger to those who go upon it, and persons about to cross a railroad track are bound to recognize the danger, and to make use of the sense of hearing as well as of sight; and, if either cannot be rendered available, the obligation to use the other is the stronger, to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly or carelessly upon the track, without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence;" citing *Mynning v. Railroad Co.*, 59 Mich. 260, 64 Id. 101; *Greenwood v. Railroad Co.*, 124 Penn. St. 572; *Allen v. Railroad Co.*, 19 Atl. Rep. 105.

3. One approaching a railroad track with the intention of crossing should look in both directions, and listen, to ascertain whether a train is coming; citing *Railroad Co. v. Thompson*, 62 Ala. 494; *Railroad Co. v. Bell*, 70 Ill. 102; *Railroad Co. v. Byam*, 80 Id. 528; *Railway Co. v. Mathias*, 50 Ind. 65; *Laverenz v. Railroad Co.*, 56 Iowa, 689; *Butterfield v. Railroad Co.*, 10 Allen, 532; *Tully v. Railroad Co.*, 134 Mass. 499; *Abbett v. Railway Co.*, 30 Minn. 482; *Railroad Co. v. Mitchell*, 52 Miss. 808; *Fletcher v. Railroad Co.*, 64 Mo. 484; *Powell v. Railroad Co.*, 76 Id. 80; *Cordell v. Railroad Co.*, 75 N. Y. 330; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66; *Railroad Co. v. Whitacre*, 35 Id. 627.

4. If a person is not required to look upon a railroad track before attempting to cross it, there is no available precaution which the law can exact of a man of sound mind for his own preservation; citing *Railroad Co. v. Van Steinburg*, 17 Mich. 127.

J. M. Jamison (*Montgomery & Bundy*, of counsel), for plaintiff, contended for the doctrine of the opinion.

MORSE, J. The plaintiff's intestate was the driver of a street-railway car in the city of Grand Rapids, and on the 23d day of April, 1889, while driving his car on West Fulton street, in said city, was killed by a collision with a train of the defendant company at the street crossing. This is an action for damages on account of his death. Plaintiff recovered judgment in the Kent circuit court in the sum of $5,313. At the close of plaintiff's proofs, the defendant demurred to the evidence, and

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asked that a verdict be directed in its favor, on the ground that the plaintiff's intestate was not in the exercise of due care and caution when the accident occurred, and was therefore guilty of contributory negligence. This motion was denied, and the defendant thereupon put in proofs. This action of the trial court and other errors are alleged as reasons for the reversal of this judgment.

We will first examine the question whether the court erred in permitting the plaintiff to go to the jury as to his intestate's negligence. This must be decided, as is admitted by defendant's counsel, upon the case as made by the testimony on the part of the plaintiff, which case is substantially as follows:

Between the hours of 4 and 5 in the afternoon of April 23, 1889, Sherwood, with his car drawn by one horse, came down West Fulton street, approaching defendant's track. West Fulton street runs nearly east and west, and the railroad track crosses it nearly at right angles. Sherwood was going east. About 185 feet west of the defendant's track is another railroad crossing, that of the Lake Shore & Michigan Southern Railway. Sherwood was observed crossing this latter track on a walk. Beyond that to the east it is down grade, and he then started his horse on a trot, and continued until within 25 or 30 feet of defendant's crossing, when he "slowed down" to a walk. At this crossing, on the north side of West Fulton street and the west side of the railroad track, is a shanty used for a flagman, who was stationed there to give warning of the approach of trains to the passers-by. To the north the view of the track was comparatively unobstructed, but upon the south side of the street, and to the west of the railroad track, were situated a lumber-yard, lumber office, coal-shed, lumber-sheds, and piles of lumber and posts, more or less obstructing the view of cars coming from the south. On the day in question there was at least one car loaded with lumber upon a side track in the lumber-yard, which added to the obstructions.

The witnesses who testified to seeing Sherwood approach

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the track did not all see him in the same place; some did not notice him until he was within 25 or 30 feet of the track, and others not until he was right upon it. Others saw him as he crossed the Lake Shore & Michigan Southern track, and until he was injured, except such times as they were looking at the cars. They do not agree as to what he was doing, except that he was on a walk within 25 or 30 feet of the track, and had hold of the lines, and some say one hand on the brake, and was standing in his usual place upon the front platform of his car. Some did not notice where he was looking. One witness says he looked straight ahead all the while, as if he was looking at the horse; others, that he looked to the north all the time, and towards the watchman's shanty. One witness, and the only one who so testifies, says that he saw Sherwood's head go both ways. He first observed him 40 or 50 feet back of the track.

Just as Sherwood got to the track a train of nine cars, detached from the engine, came down the track from the south. "Sherwood then stopped, put his hand on the brake, tried to 'brake up,' but could not. The horse was on the track, his forward feet across it. The horse gave a jerk, and pulled Sherwood over the dash-board, and under the car." Sherwood died of the injuries there received. These cars were running, as testified by plaintiff's witnesses, at the rate of from 8 to 12 miles an hour, the majority estimating the speed at from 8 to 10 miles an hour. There was no warning of the approach of these cars, except the noise they made in running. There was no lookout on the forward car. There was a man standing on the third car from the front of the train, but he was looking north-east, and giving no attention to the crossing. The flagman was not at his usual post of duty, and no signal or warning was given by him until the horse was on the track. He then ran out of the shanty or flag-house in his shirt sleeves, and bare-headed, but too late to warn Sherwood of his danger.

The plaintiff's claim was that the defendant was negligent in the following particulars:

1. That the cars were run at too high rate of speed, in violation of the city ordinance,—a speed which also, in view of the nature, locality, and surroundings, was as a matter of fact, dangerous and negligent.

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2. That no proper signals were given to warn those approaching the crossing, and particularly the deceased, of the approach of the train.

3. That the flagman was absent from his post of duty, which was outside of the flag-house, with his flag to give warning (but was present in the flag-house, in view of the deceased), and failed to give any warning of the approach of the train.

The negligence of the defendant is apparent from the evidence on the part of the plaintiff, and need not be discussed further.

It is contended by the defendant's counsel that the plaintiff's intestate was guilty of negligence as a matter of law; that there were places on the line of Sherwood's course before he reached the track where he could have seen these cars approaching, had he looked to the south; that, at a point 40 feet west of the railway crossing, the cars could have been seen before the lumber office obstructed the view; that a hundred feet of the track was visible by looking through between the office and the lumber-piles; also that, at a point 25 feet from the crossing, a car could be seen 74 feet south of the crossing, and from a point 16 feet west of the crossing a car could be seen approaching from the south 167 feet south of the crossing,—the street-car track being in the center of the highway. We do not think from the testimony produced by the plaintiff that Sherwood could have seen the cars approaching from the south, after he left the crossing of the Lake Shore & Michigan Southern Railway, until he came within about 20 feet of the crossing. If he had looked then, he would have undoubtedly seen these cars in time to have stopped and avoided a collision. And it is pretty apparent—almost absolutely certain, from the plaintiff's own showing—that he did not look south within said 20 feet, until his horse was upon the track.

Whether he was negligent depends in a great measure

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upon whether or not he had a right to rely, under the circumstances, upon the absence of the flagman, and the lack of any signal of danger from him.

It is claimed by defendant's counsel that the obstruction of the view to the south, and the absence of the watchman from his post, called upon Sherwood to have stopped, and looked and listened, before he attempted to pass this crossing. This claim would be correct if, at this street crossing, no flagman had been stationed to give warning. But the testimony shows that a flagman had been kept at this point for three or four years, whose duty it was to signal by a flag in the street the approach of trains. It is not the law of this State that, under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways and to listen for approaching trains. It is generally required, but it is not a rule of universal application. Every case must depend upon its own circumstances, and it would be unreasonable to apply such rule, under all circumstances, without regard to the condition of things at the time. *Cooper v. Railway Co.*, 66 Mich. 266. Nor is a traveler compelled, under all circumstances, to stop before crossing, if his view is obstructed from one way. He is only required to take such precaution as an ordinarily prudent man would under like circumstances, and whether or not he did use such care is generally a question for the jury. See *Guggenheim v. Railway Co.*, 66 Mich. 157, 158, and cases cited.

Plaintiff's counsel contend that, it appearing that the defendant had stationed a flagman at this crossing, whose duty it was to warn parties about to cross of approaching trains, it was for the jury to say whether the deceased, in keeping his eyes directed to the flagman for the very purpose of observing a signal at the earliest moment that it could be given, was not exercising due care. They cite

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the following cases in support of this contention: *French v. Railroad,* 116 Mass. 537; *Sweeny v. Railroad Co.,* 10 Allen, 377; *Railroad Co. v. Hutchinson,* 120 Ill. 592 (11 N. E. Rep. 856); *Pennsylvania Co. v. Stegemeier,* 118 Ind. 305 (20 N. E. Rep. 843); *Glushing v. Sharp,* 96 N. Y. 676; *Railway Co. v. Schneider,* 45 Ohio St. 678 (17 N. E. Rep. 321); *State v. Railroad Co.,* 80 Me. 444 (15 Atl. Rep. 39); *Central Trust Co. v. Railway Co.,* 27 Fed. Rep. 159: *Tyler v. Railroad Co.,* 137 Mass. 238; *Railway Co. v. Yundt,* 78 Ind. 373.

In *French v. Railroad,* 116 Mass. 537, the submitting of the question of contributory negligence to the jury was not affirmed upon the ground of the absence of the watchman alone, but in connection with the further fact that a train had just passed, and plaintiff did not suppose, or have reason to suppose, that another would follow so closely as it did, the cars doing the injury having been cut off from another train, and "shunted" down the track.

In *Sweeny v. Railroad Co.,* 10 Allen, 377, the flagman signaled the traveler to come on, and he went upon the track, relying upon such invitation. It was said by the court:

"No express invitation need have been shown. It would only have been necessary for the plaintiff to prove that the agent did some act to indicate that there was no risk of accident in attempting to pass over the crossing."

In *Railway Co. v. Yundt,* 78 Ind. 376, the court say:

"If the defendant had, for a considerable time before the accident, kept a flagman at the crossing to give signals on the approach of trains, and if the plaintiffs had been in the habit of crossing the railroad at that place, and observing the signals, and if, on the occasion of the accident, no signal was given, the plaintiffs not knowing that the services of the flagman had been dispensed with, these facts might, in our opinion, be considered by the jury, in connection with all the other circumstances, in

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determining whether or not the plaintiffs were free from contributory negligence."

It is also said in *Railroad Co. v. Hutchinson*, 120 Ill. 592:

"We are aware of expressions by this court, when passing upon the law and fact, and of like expressions by other courts of the highest respectability, that the failure of one approaching a railroad crossing to pause and look for the approach of trains was such negligence as would, in the case then under consideration, preclude a recovery. But we are not prepared to say, as a matter of law, that a person approaching a railroad crossing, where there is nothing apparent to warn him of danger, and at which he knows a flagman is stationed, whose known duty it is to warn all persons of danger from running trains, is required to look elsewhere than to the flagman. The flagman's duty is to know of the approach of trains, and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty. * * * It may be that in the particular case a reasonably prudent and careful man would do more than observe the absence of the ordinary signal by the flagman; but, if so, the facts and circumstances should be submitted to the jury, to be considered by them in determining whether the party had, under all the circumstances, exercised ordinary care and caution to prevent injury."

In *Glushing v. Sharp*, 96 N. Y. 676, and in *Railway Co. v. Schneider*, 45 Ohio St. 678, there were gates at the crossings, attended by a gateman, which gates were closed when there was danger of an approaching train, and open when there was no such danger. In both these cases, the gates being open, the persons injured drove in upon the track upon the assumption that there was no danger. Held, that such persons had the right to presume, in the absence of knowledge to the contrary, that the gatemen were properly discharging their duties; and that it was not negligent on their part to act on the presumption that they were not exposed to a danger which could only arise from a disregard of their duties by the gatemen.

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The following cases tend to support the plaintiff's contention that the question of Sherwood's negligence was for the jury: *Tyler v. Railroad Co.*, 137 Mass. 238; *Railway Co. v. Clough* (Ill.), 25 N. E. Rep. 664; *Pennsylvania Co. v. Stegemeier*, 118 Ind. 305; *Central Trust Co. v. Railway Co.*, 27 Fed. Rep. 159; *State v. Railroad Co.*, 80 Me. 430, 444; *Burns v. Rolling Mill Co.*, 65 Wis. 312, 315 (27 N. W. Rep. 43). See, also, Shear. & R. Neg. § 466.

On the contrary, we are cited to a case in Pennsylvania (*Greenwood v. Railroad Co.*, 124 Penn. St. 572, 17 Atl. Rep. 188) where gates and a watchman had been kept at a crossing. The gates were lowered at the approach of trains. The gates were out of repair. Being open, the plaintiff drove a hose-cart across the track without stopping or looking or listening. The watchman displayed no signal and gave no warning. The court held this to be contributory negligence on his part, and said, speaking through the chief justice:

"I do not understand the law to be that, when a railroad company adopts safety-gates or any other appliance for the protection of the public, the public are thereby absolved from the duty of taking any care of themselves. * * * The plaintiff was bound to do his part. He has no right to omit the ordinary precautions when approaching a railroad crossing merely because he finds the gates up. Each party should be held to the exercise of due care. * * * If the rule to stop, look, and listen were always observed, an accident at crossings, now so frequent, could rarely occur, whether in town or country. It is as important in towns as in the country. It is sustained by such abundant authority, and founded on such excellent common-sense reasons, that we will neither depart from it, nor allow it to be undermined by exceptions. It is a clear and certain rule of duty, and a departure from it is more than evidence of negligence; it is negligence *per se*."

The evidence on the part of the plaintiff tended to

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show that the watchman was inside the shanty or flag-house. The door of this house opens on the east, facing the railroad track. There are two small windows in it, one in the north and one in the south end, so that the flagman can see up and down the track both ways. It is claimed by the plaintiff that Sherwood was looking towards this south window, and could see the flagman therein before he reached the track, while the defendant claims that he could not have seen him until his horse was on the track. Of course, if Sherwood saw the watchman inside of his house, where such flagman could plainly see an approaching train, and the flagman gave no signal, it would be a more favorable circumstance to plaintiff, as bearing upon Sherwood's negligence, than if the flagman was apparently absent from his post, and Sherwood could not see him at all. The only evidence as to whether Sherwood could have seen the flagman through this window comes from two witnesses. Gilman, for the plaintiff, says:

"The windows on the north and south sides of the shanty are well towards the east, and near the two corners. They are small windows. A person coming from the west, driving a street-car, could not see through those windows, to see who was in the shanty, until he got opposite. When they got opposite they would be right up by the track."

Rooney, for the defendant, says:

"The driver could have seen him [the watchman], if he was watching carefully for him, through the window that fronts Fulton street."

Under all the circumstances, I am satisfied that the court correctly submitted the question of Sherwood's negligence to the jury. He instructed them that—

"A railroad crossing is a place of danger, and is itself a warning to any one about to go upon it to be careful and vigilant to the extent of his opportunities. It was

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the duty of Sherwood in approaching the railroad track to use his senses of sight and hearing to ascertain whether a train was approaching, and, if the jury find that he did not, then the plaintiff is not entitled to recover."

The jury were further instructed that it was the duty of Sherwood to exercise due care whether or not the flagman was in sight, and, if the flagman was found not to have been present to give warning, such fact could be considered as bearing upon the negligence of both Sherwood and the defendant.

The jury were further instructed as follows:

"If the deceased, Sherwood, by the exercise of ordinary care and prudence, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so would amount to such negligence as would defeat plaintiff's right of action, unless you find that his attention at the time was directed to the flagman and the flag-office, and that he had a right to rely on the position of the flagman, and absence of warning, as an assurance of safety. If the jury find the view of the track approaching from the south was obscured somewhat by lumber, etc., in Pierce's lumber-yard, so that a train could only be observed by extreme care and caution, and that Sherwood knew this, then it was the duty of Sherwood to use such extreme care and caution as was appropriate to the circumstances. This would be true in a case where there was no flagman; but the question of the extent to which the deceased had a right to rely upon the position of the flagman, and his failure to give warning, is a question for the jury. It is the duty of every car-driver, when approaching a railroad crossing with passengers in his car, where his view of an approaching train is somewhat obscured, to stop, and look and listen, to insure himself that a train is not approaching before he attempts to cross, unless the negligence of the duty of the company, through the absence of its flagman or his failure to give warning, was such a notice to Sherwood that it was safe to cross as would excuse an ordinarily prudent man from stopping, and looking and listening. * * * *

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"It was the duty of Sherwood, in approaching such crossing, to have his horse and car under control, so that he could respond quickly to the slightest intimation of danger; and if he approached the track after he received such intimation, or was negligent in looking or listening for such intimation, and thus contributed to the injury, then the plaintiff cannot recover."

"If the jury find that a person of ordinary care, driving the street-car, as Sherwood was, might, by exercising proper care and diligence, have ascertained that the cars were approaching from the south at the time of this accident, then the plaintiff cannot recover in this case, however negligent the railroad company may have been, and although the flagman was not at his post of duty to give warning. * * * * * *

"If the railroad company was negligent, and the flagman was negligent, and Sherwood was also so negligent as to in any manner contribute to the injury, then the plaintiff could not recover."

"To entitle the plaintiff to recover, he must establish that the death of Sherwood was caused by the negligence of the defendant. This, of course, requires a showing that Sherwood was not himself guilty of negligence which contributed to the injury. To constitute negligence contributing to the injury on the part of Sherwood, there must have been a failure on his part to observe and exercise ordinary care; and, if the plaintiff has shown that the deceased, Sherwood, used such care as men of ordinary prudence would have exercised under like circumstances, and placed as he was, then he was not guilty of contributory negligence.

"In determining whether the deceased, Sherwood, used due care, you have the right to take into account the obstructions to the south, their nature and extent, the manner in which Sherwood was driving, the fact of the defendant having maintained a flagman at the crossing, and the fact, if it be a fact, that this was known to Sherwood; and you have a right to take into account whether the deceased was watching for the flagman, the extent to which he had his car under control, the extent to which he looked out for trains; and you are then to say whether he used such care as men of ordinary prudence would have exercised under like circumstances,

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and, if he did use such care, he was not guilty of contributory negligence."

The defendant asked the court to instruct the jury, in substance, that the absence of the flagman from his post did not in the least excuse Sherwood from exercising his senses of sight and hearing to ascertain whether the train was approaching; and that, if the deceased, Sherwood, by looking up the track in the direction of the approaching train, could have seen it in time to avoid the injury, his omission to do so was such negligence as would prevent plaintiff's recovery. This was refused, and it will be seen that the court left it to the jury to determine whether, under the circumstances, Sherwood had a right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from such watchman, as an assurance of safety; and they were instructed that, if an ordinarily prudent man would have done the same as Sherwood did under the same circumstances, the plaintiff could recover.

I find no errors in the charge on the subject of negligence.

There were no material errors in receiving or rejecting testimony.

It is alleged that the court erred in his instructions as to damages. The evidence showed that the next of kin of the deceased consisted of his mother, Fannie Sherwood, two brothers, Seth W. and Frank Sherwood, and two sisters, Ella and Marcella Sherwood. The deceased lived with his mother, as did his sister Ella, who was an invalid. Frank lived with his mother. The older son, Seth, had not been heard from in five years, at which time he was in Wisconsin. Mrs. Sherwood testified that deceased helped her from eight to ten dollars per week. He also assisted her in her work about the house when

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he was off duty as car-driver. He was 30 years of age at the time of his death. She testified that his board, allowing him for his help about the house, was worth about $2 per week. Frank worked at a restaurant for $1 a day, and contributed some to the support of the family. Since the death of Cady, the deceased, Frank has contributed nearly his entire wages to the support of the family; before that about $2 per week. The oldest daughter, Marcella, boarded and lodged at home, but contributed nothing to the support of the family. The mother testified that the deceased contributed $2 per week towards the support of his invalid sister, Ella. Ella was 21 and Mrs. Sherwood 54 years of age when Cady died. The court instructed the jury as follows:

"If you find the plaintiff entitled to recover, he is entitled to recover damages to the extent of the pecuniary loss which the mother and next of kin of the deceased, Mr. Sherwood, have sustained by his death. This amount will be such an amount as the jury are able to say it is reasonably probable would have been contributed by the deceased to their support had he lived. The jury cannot go beyond the term of the expectancy of life of the deceased, which is shown by the tables to have been 35.33 years, and, in weighing the testimony as to the contributions which would have been likely to have been made to the mother of the deceased, the jury cannot extend these beyond the period of her expectancy of life, which is shown by the tables to have been 18.79 years. As to the testimony of contributions to the sister, these cannot be considered, except for the period after the probable decease of the mother, and, under the testimony, such contributions are said to have been included in the sum which was contributed to the family. It is not for the court to intimate what amount of contributions the deceased would have contributed to the family, nor is the evidence of what he had in his life-time contributed conclusive upon this subject, but it is evidence which the jury have a right to consider for what it is reasonably worth, and it is for the jury to say what it is reasonably probable that the deceased would have con-

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tributed, both as to the extent and duration thereof, not exceeding the time stated as his expectancy of life, and not exceeding the amount shown to have been contributed in his life-time; and, if you are able to fix the sum which he would have annually contributed, then I charge you that the plaintiff should recover only the present worth of that sum, as you may find it to be, not exceeding in amount ten thousand dollars, the amount stated in the declaration."

The statutes giving damages in cases like the present are as follows:

How. Stat. § 3391. "Whenever the death of a person shall be caused by wrongful act, neglect, or default of any railroad company or its agents, and the act, neglect, or default is such as would (if death had not ensued) entitle the party injured to maintain an action, and recover damages in respect thereof, then, and in every such case, the railroad corporation which would have been liable if death had not ensued shall be liable to an action on the case for damages, notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony.

"SEC. 3392. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered: *Provided,* nothing herein contained shall affect any suit or proceedings heretofore commenced, and now pending in any of the courts of this State."

We held in *Van Brunt v. Railroad Co.*, 78 Mich. 530, that, under these statutes, none of the next of kin could recover unless they showed a pecuniary injury on account of the person killed, and if, as in that case, the proofs showed no person pecuniarily injured by the death of plaintiff's intestate, there could be no recovery; that it

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evidently was not the intention of the Legislature to make one rule of damages in the case of a person killed through the negligence of a railroad company, and another rule in the case of a person killed by some person or corporation other than a railroad company. Under this holding, damages in this case could only be recovered on account of the mother, and the sister Ella, as no pecuniary injury was shown to the others by Sherwood's death. The court, in effect, so limited it, and was also correct in allowing no damages to be computed on account of the sister until after the mother's death, as, under the testimony, these contributions to the sister were included in the contributions to the family.

It is urged that the court erred in allowing the recovery of any damages on account of the sister Ella, because under the law of distribution of the personal property of intestates passed in 1889, and which was in force at the time the verdict was rendered, the whole of the personal estate of the son descended to the mother, and she would therefore be entitled to the whole of the damages. Act No. 168, Laws of 1889 (3 How. Stat. § 5772 *a*). But the distribution of the personal property of Sherwood's estate would, we think, be governed by the law in reference thereto existing at the time of his death, which provided that the property in such a case as this should descend, one-half to his mother, and the remainder in equal shares to his brothers and sisters. Act No. 169, Laws of 1883. See, also, How. Stat. § 5847, subd. 6.

The counsel for defendant argue, further, that, if the personal estate descends under the law of 1883, section 3392 of Howell is invalid and inapplicable, because, by the latter statute, the jury are authorized to give such amount of damages as they deem fair and just to the persons who may be entitled to such damages when recovered; and this has been construed to mean that the jury

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may give such damages as have been sustained by the several persons who have suffered pecuniary loss. But, as the same statute also provides that the money so recovered shall be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, it is argued that the brothers and sisters are all put upon the same footing, whether any damages have been recovered on their account or not; and that in this case, if the other sister and the brothers should apply to the probate court for their share, such court could not refuse to order it turned over to them. They would thereby receive money, in effect, for damages which the statute would not permit to be recovered on their account, because they had suffered no pecuniary loss by their brother's death.

There is a seeming contradiction or inconsistency in this statute under the construction given it in *Van Brunt v. Railroad Co.*, 78 Mich. 530, but, as so construed, it is identical in its provisions with section 8314, How. Stat.,[1] under which statute damages have been recovered, and affirmed by this Court, in a number of cases. And in *Hunn v. Railroad Co.*, 78 Mich. 513, the assessment was affirmed as proper of nominal damages only to the brother and sisters of Hunn, who were entitled to a share with the widow of the personal estate of the deceased under our laws of distribution of personal property.

The same objection, with more elaboration, was made to a statute of New York, similar to ours, by Hoar, J., in *Richardson v. Railroad Co.*, 98 Mass. 85, 90, 91, but the case was not, however, decided upon that ground.

What disposition is made of the money recovered, if the defendant is liable for it, for pecuniary damage suffered by any of the next of kin through its negligence,

[1] For a construction of this section, see *Hurst v. Detroit City Ry.*, 84 Mich. 539.

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does not concern the defendant. When a conflict arises under this statute as to the distribution of the money recovered as damages, it will then be competent and necessary for the courts to decide who are entitled to the fund. The damages are manifestly to be given in reference to the pecuniary injury resulting from the death to those persons who may be entitled to such damages when recovered. See section 8314, How. Stat.; *Van Brunt v. Railroad Co.*, 78 Mich. 530. It would seem that in this case the damages should have been given, as they were under the charge of the court, in reference to the pecuniary injury suffered by the mother and the sister Ella, and there also would seem to be no serious difficulty in the way of their obtaining the amount from the administrator.

It is claimed that the verdict was excessive. With that we have nothing to do. But if the jury found that Sherwood contributed $7 a week to his mother, and $2 per week to his sister, as they were warranted in doing from the proofs, considering the expectancy of life of the mother and son, the verdict cannot be said to have been excessive.

The judgment is affirmed, with costs.

McGRATH and LONG, JJ., concurred with MORSE, J.

CHAMPLIN, C. J. (*dissenting*). I think the judgment in this case should be reversed.

What the law requires of all parties is due caution to avoid negligently injuring another, and it requires the same care or caution to avoid being injured by the negligence of another. This care or caution or precaution is not measured by the care that people generally or ordinarily observe respecting themselves and their affairs, but it is measured by the occasion and the circumstances under which the danger or injury is threatened, and calls upon

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persons placed in a position known to be dangerous to exercise active diligence and foresight to avoid it; and the test is not what an ordinarily prudent person would do, but is, what *should* a prudent person do under the circumstances?

To say that a person is excused from exercising due and proper care to avoid injury or accident, if he does as people ordinarily do, without distinguishing between careless people and prudent people, is to lay down a rule that carelessness is ordinary prudence or caution. It is an ordinary trait of character for most people, old and young, daily to take risks involving danger of injury to their persons. It is a natural trait of young people, before they have arrived at an age when deliberation succeeds to impulse, and out of the experience of their lives in suffering from undue haste have learned to be cautious, to take risks and hazard their personal safety. It takes some a longer time than others to learn these lessons of prudence, and some never learn them; and, if a thousand heedless persons rush into danger, there is no reason why one such heedless person, who, taking the chances, receives an injury, should be allowed to recover because a thousand neglected to exercise prudence. The question is not what others would do or might have done, but it is, did he exercise prudence and due care to avoid the injury, under the circumstances by which he was surrounded?

Plaintiff's intestate was in a position to know the danger encountered at that crossing. The law and common sense required him to exercise prudence in approaching it,—that is, not to rush upon it at an immoderate rate of speed; and it called upon him to use that precaution to avoid being run upon and injured which the circumstances and surroundings permitted him to exercise

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by looking for himself up and down the track to see if a train was approaching.

I do not think the deceased was excused from exercising his faculties of sight and hearing by the fact that a watchman had been employed at the crossing, and the further fact that the watchman was not in his sight. He had no right to presume when the watchman was absent that he could safely cross the track. It might have been different if he had seen the watchman at his station, and he gave him no intimation that there was any danger to be apprehended in crossing.

GRANT, J. (*dissenting*). West Fulton street, in the city of Grand Rapids, runs nearly east and west, and crosses the defendant's road nearly at right angles. Plaintiff's decedent was a street-car driver, and was driving east on this street. About 185 feet west he had crossed the track of the Lake Shore & Michigan Southern Railway. He crossed that track upon a walk, after which he started his horse upon a trot, and, when within from 25 to 30 feet of the defendant's road, he had "slowed down" to a walk. He continued at this pace until he was upon the defendant's track, when he was struck by some cars, passing over defendant's road to the north, and was killed. Plaintiff recovered verdict and judgment in the court below, and defendant appeals.

A flagman had been stationed at this crossing for about four years. It is claimed by the plaintiff that this flagman was not at this time at his post of duty, giving the customary signals of an approaching train. Defendant requested the court to direct a verdict for the defendant, on the ground that plaintiff's decedent was guilty of contributory negligence.

It is evident that Mr. Sherwood, when within 25 feet of the center of the crossing, could have seen the cars

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approaching from the south, at a distance of 74 feet from the crossing. When within 16 feet he could have seen them 167 feet distant, and when within 12 feet he could have seen them full 300 feet distant. He did not look in that direction, nor stop his car to look or listen, but drove steadily along until his horse was upon the track, and the front end of his car projected over the track, when they were struck by the approaching cars. It was down grade at this point of the defendant's road. Defendant's employés were doing what is commonly called a "kick." The cars were set in motion, and a brakeman left on to stop them. These cars were to be stopped just north of Fulton street, and left until defendant got through with switching at another point. It is evident that the deceased did nothing to inform himself as to whether or not a train was approaching, except it were to look for the flagman and a signal from him.

The theory of the plaintiff is that the deceased was looking to the flagman's shanty, within which it is claimed the flagman was at the time, and that he had the right to rely and act upon the absence of the flagman as a notice that no train was approaching, and that it was a question for the jury to determine whether or not he was guilty of contributory negligence. The following is all the testimony given by the plaintiff in regard to the conduct of the deceased: Benjamin Hall testified:

"From the time I first saw the driver, which was when he was about half-way between the Lake Shore and the Chicago & West Michigan tracks, I watched him all the while until the accident occurred. I couldn't say as to how he was looking. I don't know. He continued to walk down. The horse walked all the way until it got on the track. I couldn't tell whether he was looking to the right or to the left."

Joseph E. Quigley testified:

"I observed the driver just as he was half-way between

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the lumber office and Pickell's office, in the coal-yard, about twice the length of a street-car from the railroad track. He was standing facing his horse with his right hand on the brake, and the lines in his left hand, looking straight,—looking, as I should think, at the horse more than anything else,—looking ahead. I cannot state whether or not he looked to the north or south. He was driving at a walk."

Witness further said that when he saw the railroad train he thought it was 138 feet south from Pierce's office, and he should judge that the street-car was then 40 feet from the railroad track.

Byron R. Wheeden testified that he saw the car, but not the driver, when just a little ways west of the West Michigan track, and the horse was on a walk.

Frederick E. Parks testified:

"I observed the driver of the street-car 40 or 50 feet back of the track. He was driving with his right hand on the brake, and his left on the lines. He came down to a walk about 30 feet from the track, as near as I judged. I saw his head go both ways. He looked straight ahead again from that on. He neither looked to the right nor left till he got pretty close to the track."

David F. Cogswell testified that he saw Sherwood back almost to the Lake Shore crossing; that he was then driving between a trot and a walk; that as he neared the West Michigan crossing he was driving slow; that about 30 feet from the track he drove behind the flagman's station, so that witness could not see him again till he came out from behind the building; and that when he again came in sight he could not say whether he was on a walk or not.

David Forbes testified that his attention was first attracted to the situation by the blowing of the whistle; that he then saw the street-car driver going east; that after he got off the Lake Shore road he started on a

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pretty good jog, but slowed up as he went on, and was very near on a walk when he got to the track.

This testimony affords no foundation for the claim that he was looking specially at the flagman's station to see if he was within. He could not look within it until he was opposite thereto, and very close to the track.

The deceased's occupation, in which he had been employed for some time, took him over this track many times every day. He was perfectly familiar with the situation. He knew that switching was liable to be done there at any time, and that it was usually done about the time of day that this accident occurred. Some of the witnesses for the plaintiff, standing a considerable distance away, heard the whistle, saw the approaching train, and recognized the danger which the deceased was approaching. So, also, did some of the witnesses for the defendant, one of whom testifies to halloing to the driver, and warning him of the danger.

Under this state of facts, I am unable to see how reasonable minds can differ as to the conclusion to be drawn therefrom. A glance to the south would have disclosed to the deceased the approaching cars in season for him to stop, just as surely as a glance would have disclosed to him the absence of the flagman. The one conclusion, therefore, is that he was taking no precautions whatever in his approach to this most dangerous place. If there had been no flagman stationed at the crossing, he would, under all the authorities, have been guilty of contributory negligence. Therefore the question is clearly presented by this record, did the absence of the flagman release him from taking any precautions to determine whether or not a train was approaching? He had the lives, safety, and property of others under his charge and control. It is the universal and reasonable rule that in all such places one must always be in the exercise of

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due care, to protect, not only himself, but those who are temporarily committed to his charge. Certainly a rule that would absolve him from exercising at least ordinary precaution is not founded upon reason or upon humanity. Whatever risks one may see fit to take when he himself is concerned, he certainly should be held to exercise reasonable care when he is taking others, who cannot look out for themselves, into places of danger. Is it a reasonable rule towards the traveling public to hold that a street-car driver may place implicit reliance upon the absence of a flagman, and drive his car with its load of passengers upon the track of a railroad, without any precautions whatever to ascertain whether danger is approaching, and to avoid it? If it is not so far as his passengers are concerned, it certainly is not as to himself. The deceased had no right to transfer the exercise of his own sense of hearing and seeing to another. Even the slightest care on his own part would have avoided the accident, for a glance would have shown him the danger. Being upon a walk, he could, by applying the brake, have stopped his car almost instantly, and within a distance of two or three feet.

The adoption of safety-gates, and the stationing of flagmen at these crossings, are wise additional precautions for the safety of those upon the trains, as well as of those who are crossing upon the streets. But they should not be held to change that reasonable rule requiring care on the part of all who enter upon places of danger. The books furnish many cases where flagmen, and even those in charge of the gates, do not perform their duty, and hence are negligent, which negligence is to be attributed to the railway companies. It would, however, be unreasonable, in my judgment, to permit parties approaching these crossings to assume that these flagmen and gate-keepers will always do their duty. In the

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absence of the flagman, I think it was the duty of the deceased to stop and look and listen before driving upon the track. This rule is clear, certain, and reasonable. The exercise of even slight care on the part of those approaching these dangerous places on our public highways would avoid a great majority of the accidents.

At the time this accident occurred a bill was pending in the Legislature, and was passed shortly thereafter, requiring street-car drivers to bring their cars to a full stop before going upon these railway crossings, and to make sure that no engine or cars are approaching, and imposing a fine of $25 for neglect to do so.[1] This statute, in my judgment, but adopted the reasonable rule of the common law. It is well grounded in reason and a wise public policy. It is the only rule which can afford protection to the traveling public. It is not unjust to the traveler who has the control of his own volition, and the power to so easily inform himself and avoid accident. Were it not a reasonable rule, the Legislature would have no right to impose a penalty for its violation.

But plaintiff's counsel strenuously insist that this was a question for the jury. Courts should be very careful not to encroach upon the province of the jury, but, at the same time, they should be equally careful not to abdicate their own functions to the jury. It is the clear duty of the courts to instruct the jury as to the legal effect of undisputed facts, unless different conclusions can be drawn by reasonable minds from such facts. An act which is *per se* negligent is not rendered prudent and careful, within the meaning of the law, by the fact that many do it. So the fact that the street-car drivers were at this time in the habit of driving over this crossing without stopping, or taking other precautions to avoid danger, was incompetent and immaterial, and did not

[1] Act No. 222, Laws of 1889 (3 How. Stat. § 3565c).

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relieve the deceased from that duty which he owed to himself and to others.

It is but just to the flagman to say that, under the evidence of the defendant, he gave the signal required by law. But, under the evidence of the plaintiff, both he and the deceased were equally guilty of gross negligence. The law imposed a plain duty upon each, which each neglected to perform.

Judgment should be reversed, with costs of this Court, and a new trial ordered.

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ARTHUR SCHINDLER, BY ANDREW SCHINDLER, HIS NEXT FRIEND, v. THE MILWAUKEE, LAKE SHORE & WESTERN RAILWAY COMPANY.

[See 77 Mich. 136.]

Railroad companies—Accident at crossing—Gross negligence—Infants—Imputed negligence.

In this case the finding of the jury that the defendant was guilty of gross negligence in the management of certain detached freight-cars, to the injury of the plaintiff, who had not arrived at the age of accountability, is held to have been warranted by the evidence and circumstances surrounding the case, as set forth in the opinion.

Error to Gogebic. (Daboll, J., presiding.) Argued April 21, 1891. Decided July 28, 1891.

Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion, and in 77 Mich. 136.

M. M. Riley (*Bradley G. Schley*, of counsel), for appellant.

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Hayden & Young, for plaintiff.

[The points of counsel are fully discussed in the opinion.—REPORTER.]

LONG, J. This case has been once before in this Court, and is reported in 77 Mich. 136. Only three of the Judges were sitting at the time of the argument. The judgment was reversed and the case remanded for a new trial; Mr. Justice CHAMPLIN and the writer of this opinion concurring in the reversal of the judgment, but reserving their opinion upon the question of defendant's negligence, and agreeing to the reversal upon the ground that the declaration did not properly allege the defendant's duty, and its neglect to observe such duty. The case has been retried, resulting in a verdict and judgment for the plaintiff for the sum of $8,500. Defendant brings the case to this Court by writ of error.

The opinion by Mr. Justice CAMPBELL, reported in 77 Mich. 136, sets out in great detail the most of the circumstances involved in the case, though I shall have occasion to notice at some length some of these circumstances, and others which are made to appear in the present trial. The plaintiff at the time of the injury, which occurred on the 29th day of January, 1887, was an infant aged five and a half years. The place where the injury occurred, and the location of the railroad tracks and the streets of the village, as far as the highway crossing where the injury occurred, together with the depot grounds, freight buildings, and the building where the beer was stored, are fully represented by the map on following page.

Since the former trial the declaration, by permission of the trial court, has been amended. As amended it contains two counts, but upon the trial the circuit judge

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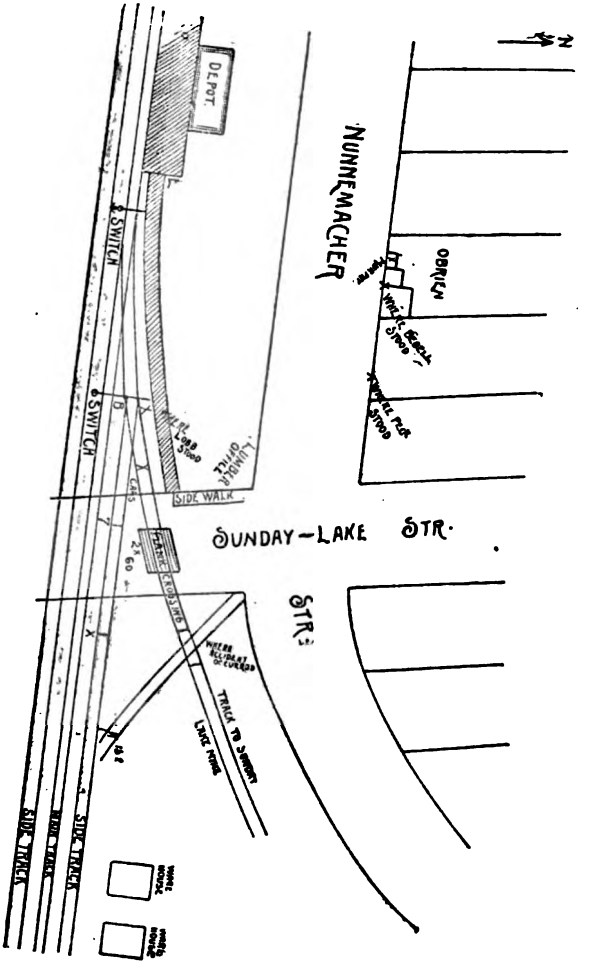

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compelled the plaintiff to elect on which count he would proceed, and he elected to proceed on the first. This counts sets out what is claimed to be the duty of the defendant in running its trains over what is called "the track to Sunday Lake Mine," and its neglect of duty by which it is claimed the injury was occasioned, and charges that the defendant was guilty of gross negligence in the management and control of the three cars which were pushed or kicked backward along this Sunday Lake branch track over and across this highway leading from the corner of Nunnemacher street and Sunday Lake street towards the beer-house, situate near the main line of the defendant's railroad; said cars being kicked across said road with great speed, unaccompanied by a locomotive, unattended by a brakeman or the conductor of the train, or by any person to set brakes or give signal or warning, and with no one at the rear or advancing end thereof to observe the crossing, or signal or warn approaching travelers in case of need, and with no one on or about said detached and moving cars acting as a lookout, watchman, or brakeman, with no flagman or switchman at the crossing to warn persons approaching, and without the knowledge of plaintiff or Schupp (in the rear end of whose sleigh plaintiff was riding). The declaration alleges that this was gross negligence on the part of the defendant towards the plaintiff.

The declaration further alleges, as to the place where the injury occurred, that at the time of the injury there was, from a point at or near the junction of said Nunnemacher and Sunday Lake streets, a private road which led across said Sunday Lake branch track in a southeasterly direction, to the warehouse grounds situate along defendant's main line and side tracks, which road had been for a long time prior thereto used by the public of Wakefield village, and others who chose to use it, for

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travel between the village on the Nunnemacher side of said tracks and the warehouse grounds, and that such use was permitted and encouraged by defendant at the time of the injury; that children, at and before that time, had been accustomed to pass and repass along said private road, and over said crossing, which was well known to defendant; and that defendant then and there owed a duty to all persons traveling over said road, and about to cross said branch track thereon, to take precautions in running cars over said crossing to prevent injury to persons thereon.

Some additional evidence appears in this record to that which appeared upon the former trial. The defendant's counsel present a brief containing 50 pages of printed matter. The brief argues many questions which have been settled by the jury.

At the close of the testimony counsel for defendant submitted the following questions to be specifically answered by the jury, which were answered as hereinafter stated:

"1. Did the employés of the defendant, in charge of its train at Wakefield at the time of the accident, know that the child Arthur Schindler was in the sleigh of John Schupp?

"*A.* No.

"2. During the time Schupp was moving from the beer-house towards the crossing C were the cars of defendant being backed upon Sunday Lake spur track?

"*A.* Yes.

"3. Was there anything to obstruct the view of Schupp of the cars that were backed from the time he left the beer-house until he reached the crossing C?

"*A.* Yes.

"4. Was the action of the trainmen in charge of defendant's train at the time of plaintiff's injury, in pushing or shunting the cars on Sunday Lake spur track in the manner which they did, such as would indicate they were regardless of the consequences, and did not care whether they ran the plaintiff down or not?

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"*A.* Yes.

"5. Could John Schupp, by the exercise of such care and prudence as an ordinarily careful and prudent man should have exercised under the circumstances, have discovered that the cars of defendant were being backed upon Sunday Lake spur track in time to avoid the accident?

"*A.* Yes."

One of the main questions involved in the controversy here is that, under the findings of the jury, their general verdict should have been in favor of the defendant. Counsel for defendant say in their brief that any claim plaintiff has for recovery must be based upon the fourth question and answer; that of the five questions the second and third are unimportant, as they bear only upon Schupp's negligence, and by their answer to the fifth question the jury have distinctly found Schupp guilty of negligence. It is contended that the answer of the jury to the first question shows that the defendant was in utter ignorance of the presence of any one there to whom it owed a special duty; that the answer to the fourth question, in the light of the answer to the first question, is a plain contradiction and absurd; and that, irrespective of the first question and answer, this fourth answer is utterly unsupported by the evidence. Thus it is that the learned counsel for defendant attempt to sweep away the special findings of the jury, except their finding that Mr. Schupp, the driver of the sleigh in which plaintiff was riding, was guilty of contributory negligence.

As we have said, the declaration charges the defendant with gross negligence. The jury have found the defendant guilty of gross negligence by the finding that its servants were regardless of consequences in shunting the cars upon the Sunday Lake spur track in the manner they did, and that these servants and employés of the

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defendant did not care whether they ran the plaintiff down or not.

The answer of the jury to the first question does not bear the interpretation for which counsel contend. The finding that the employés of the defendant did not know that the child was in the sleigh of John Schupp is not a finding that the employés did not know that people were frequently in the habit of crossing and recrossing this spur track with the knowledge and consent of defendant company. It is not a finding that these employés did not know that John Schupp was at the beer-house at the time their train came down the main track, and at the time they shunted or kicked these three cars loose from their train across this private way, over which people were accustomed to pass and repass. The testimony shows conclusively that these employés saw Schupp at the beer-house when their train came in, and knew he was on his way to that crossing at the very time when they kicked these cars across this highway. The fact, therefore, that these employés did not know that the plaintiff was in John Schupp's sleigh would have no bearing upon the question of the gross recklessness of these employés in kicking these cars across this way in the manner they did. The defendant and its employés owed a duty to all persons crossing and recrossing at that point; for it appears by the testimony in this record, which was fairly submitted to the jury, that the railroad company not only permitted its use to all persons crossing over to this warehouse, but had opened that very way by shoveling out the snow for people to pass and repass across this spur track at that point.

It is asserted by counsel for defendant that the answer to the fourth question is utterly unsupported by the evidence. It must be remembered that this question was propounded by counsel for defendant, and, now that the

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jury have found the fact against him, he complains that there was no testimony in the case tending in the slightest degree to support this finding. The testimony introduced on the part of the plaintiff tends to show that the children in the village of Wakefield often used this crossing, played upon and about it, and walked and rode back and forth upon it, to the knowledge of, and without objection from, the servants and employés of the railroad company stationed there; that from five to seven small children went with Schupp, hanging upon his sleigh, across this track to the beer-house on that day, and were with him there at the time of the coming in of the train to which these cars were attached, and were upon that side of the railroad crossing at the time these cars were shunted across this highway; and, if the trainmen had been in their proper places, and had looked, undoubtedly, from the testimony given, they could have seen these children in and around Schupp's sleigh at the time they shunted the cars across. There was no other way by which Schupp and these children could get back to the village.

The crew of the freight train consisted of Cole, the conductor; Glavin, engineer; Falvey, fireman; Durkie and Sutton, brakemen. When the train came in it ran its entire length beyond the switch marked "W" on the plat, and remained there only a few minutes, when it was moved backward along the spur track, eastward, towards the crossing C. The brakeman Durkie turned this switch, and when the train had acquired considerable momentum uncoupled the three rear cars, composed of the caboose and two freight-cars loaded with square timber, and these three cars, thus separated and kicked along the spur track, ran with considerable speed towards the crossing. The plaintiff's testimony tends to show

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that the engineer and fireman sat in the cab of the engine, and, with the cars between them and the road crossing C, their sight of this crossing was obstructed. No bell or whistle was sounded, but this may be unimportant, and probably would not be evidence of want of care at this particular crossing, being a private way across defendant's grounds, had other necessary precautions been taken to prevent persons being injured in attempting to cross there. The plaintiff's evidence tends further to show that not one of these trainmen got upon these cars, or pretended to exercise any control over them; that no one of them was at the brakes; that Durkie, who opened the switch, stood upon the ground where he uncoupled, and remained with that part of the train attached to the engine; that Cole, the conductor, was across Nunnemacher street, in O'Brien's saloon, drinking. Sutton, the other brakeman, is not produced as a witness, and his whereabouts at the time of the accident are not accounted for. It is true that Durkie says that he got upon the top of these cars on one side of the box-car next the cut-off train, and Conductor Cole claims that he was upon the forward end of the caboose, between it and the car ahead; but we are considering the question whether there was any testimony upon which the jury were warranted in finding the defendant guilty of gross negligence, and will confine the discussion to the evidence tending to show this fact, without reference to the question whether it was in dispute. We think the evidence and circumstances surrounding the case sufficient to warrant the finding.

It is said that, under the circumstances of this case, knowledge by the defendant's employés of the presence of the plaintiff there was essential to indicate that these employés were guilty of wanton and reckless conduct in

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shunting these cars over. Counsel, in support of this proposition, cited *Chicago & N. W. Ry. Co. v. Smith*, 46 Mich. 504. In that case it appears that—

"An 8-year old boy, trespassing upon the premises of the railway company, got on the top of the engine, and was ordered off by the fireman, and, as he jumped off, he fell. The locomotive was started at that moment, and the tender passed over his leg. He was a boy of more than average intelligence, and had been warned against going on the premises or riding on the engine. It was held that the railway company could not be held liable for the injury without showing that the engineer or other servants of the company in charge of the locomotive knew that the child was in the way, or that they had been reckless or negligent in the management of the engine, or could have anticipated the injury."

The circumstances in the present case do not indicate that Schupp or the plaintiff were trespassers upon the defendant's premises. Though not a legally laid-out highway, yet it was a way kept open by defendant's employés, and the public were permitted, by consent of the company, to use it as a highway. It was the only way in use to this beer-house, situate along said company's main track, and upon the company's premises; and defendant owed to the public that same degree of care in handling its trains over and across this way as though it had been a public way, except, perhaps, a statutory duty of ringing its bell or blowing its whistle on approaching the way. *Hanks v. Railroad Co.*, 147 Mass. 495 (18 N. E. Rep. 218); *Duame v. Railway Co.*, 72 Wis. 523 (40 N. W. Rep. 394). In fact, it appears by this record that the company's employés, in making up trains standing across this way, had been accustomed to open the train at this crossing for the purpose of public travel over it, and that in shunting its cars theretofore its brakemen had been accustomed to climb upon the top of the cars, with their hands upon the brake, thus keeping

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control of the cars shunted or kicked backward towards this way. The circumstances of this case, and the manner in which these cars were permitted to make this crossing, and the rights of the plaintiff over this way, certainly do not bring this case within the ruling of this Court in *Chicago & N. W. Ry. Co. v. Smith*, 46 Mich. 504. It is said by defendant's counsel that the testimony tended to show that the conduct and management of these cars upon that occasion was not reckless and wanton, but was the usual and customary conduct of trains in similar circumstances and in similar places; but, as we have said, the jury found this fact against the defendant, and we now know of no rule or decision of any court which holds the defendant not guilty of gross and wanton negligence in kicking or shunting cars across a highway without guard or brakeman upon such cars to control them, in the face of the fact that people are constantly passing and repassing over the way; and, if this is the customary and ordinary way of shunting out cars over traveled ways, it is time that railway companies took some precaution to prevent accidents, which are very likely to occur by this method of business.

It is claimed that the negligence of Schupp is to be imputed to the child, and counsel cite in support of this proposition *Lake Shore & Mich. Sou. R. R. Co. v. Miller*, 25 Mich. 277, as settling the rule in this State. In that case, Mrs. Miller, the plaintiff, was a woman of full age and discretion, and was riding with Mr. Eldridge, who was driving the team. It was said by the Court in that case that the evidence tended affirmatively to prove actual and gross negligence on their part which contributed directly to produce the injury complained of, and that they were both aware in fact that danger was to be apprehended there; and the rule was settled in the case that the negligence of Eldridge, the driver of the

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team, was the negligence in fact of the plaintiff; that this was a private conveyance, and the plaintiff identified herself with the driver, and, unless the driver was free from negligence, she could not recover. This is the general rule, and has been since followed in this State. But the facts in the present case plainly distinguish it from that. The charge in the declaration is for gross negligence. The jury have found the defendant guilty of gross negligence. There is no room, therefore, for the claim that the defendant company should be excused for its negligence, though Schupp may have been negligent, and his negligence might have been imputed to the child. Whether, under the circumstances stated here, Schupp's negligence could be imputed to the child, we do not determine, as under the finding of the jury there is no room for contending that Schupp's or the plaintiff's contributory negligence could be made applicable in determining the rights of the parties in this case. The term "gross negligence" has been used in cases decided by this Court, and has a definite meaning, when referred to as authorizing a recovery for a negligent injury, notwithstanding the contributory negligence of the plaintiff. It means the intentional failure to perform a manifest duty, in reckless disregard of the consequences, as affecting the life or property of another. It also implies a thoughtless disregard of consequences, without the exertion of any effort to avoid them.

Counsel for defendant say in their brief, in referring to *Lake Shore & Mich. Sou. R. R. Co. v. Miller*, 25 Mich. 277, and other cases cited sustaining the doctrine there laid down:

"But, again, all the above cases were cases of adults, and in that respect differed from the case at bar, of an infant 5 years old, and incapable of taking care of itself."

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Counsel, in support of their first proposition that Schupp's negligence was the negligence of the child, cite *Waite v. Railway Co.*, El. B. & E. 719. In that case it appears that the plaintiff was an infant aged five years, and accompanied Mrs. Park, his grandmother, to the railway, and by her negligence, combined with the negligence of the servants of the railway company, the plaintiff was severely injured, and brought an action by his next friend against the company. It was held by the court of exchequer chamber, affirming the court of queen's bench, that the child was so identified with Mrs. Park, in whose care he was when the accident happened, that her contributory negligence would prevent recovery. In that case the question of the gross negligence of defendant was not presented, and therefore the case has no weight in the consideration of the present one, under the claim made.

Some other questions are raised by counsel in their brief. It is claimed that there was variance between the proofs and the allegations of the declaration in reference to Sunday Lake street. The declaration alleges—

"That at the time aforesaid, leading from a point at or near the junction of said Nunnemacher and Sunday Lake streets, on the north side of said Sunday Lake branch track, a private road existed and led across said Sunday Lake branch track, in a south-easterly direction, to the warehouse grounds situated along said defendant's main line and side tracks, and thence beyond, which private road, and the crossing thereof over said Sunday Lake branch, was, at the time aforesaid, and had been for a long time prior thereto, used by the public of Wakefield, and others who chose to use it, for travel between the village on the north side of said tracks, and the warehouse grounds, and beyond, in crossing said Sunday Lake branch track; and the use thereof, as aforesaid, was permitted and encouraged by the defendant at the time aforesaid."

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There was no such variance as claimed by defendant's counsel.

It is also claimed that the court was in error in not permitting the counsel for defendant to read in evidence on the trial the testimony of one Luke Sweet, which was taken upon the first trial of the cause. In support of this claim counsel cite *Labar v. Crane*, 56 Mich. 585. That was an action for malicious prosecution. The case had once been tried. At the time of the second trial it appeared that one Allen, who was the justice who issued the warrant, was beyond the jurisdiction of the court, and the plaintiff offered to put in evidence the testimony given by him upon the first trial in the circuit court. For this purpose he called the stenographer who took the testimony, and he testified that he had it present, and that it was taken correctly. The plaintiff then offered to read it, but the defendant objected, on the ground that he had since the trial taken the deposition of Allen in the case, by the consent of the plaintiff, and that he had it present then in court. This was conceded, but the plaintiff insisted that, notwithstanding this, he was entitled to read the testimony of Allen given upon the first trial, and the court received it. It was held by this Court that the trial court was not in error in receiving this testimony. It was said by this Court in that case:

"It may be that the deposition was only supplementary and complemental to the former testimony, or was taken to bring out on the part of the defense some one point not sufficiently presented or explained before. In such a case it would be clear that the deposition would not exclude the reading of the former testimony. But we are not satisfied that it should be excluded if the deposition had been shown to cover the whole case. The plaintiff had examined the witness in open court, with full liberty of cross-examination, and, if the defendant on his own part had examined him with equal fullness afterwards,

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there would seem to be no good reason why each party should not be at liberty to put in evidence the testimony he had taken. It may be said that the deposition would be most likely to be taken down with accuracy, and this would be fair matter of argument if the two were found to differ; but we do not think the defendant could exclude the plaintiff's right to put the evidence he had taken before the jury by subsequently retaking it on his own behalf."

The present case does not fall within that ruling, and the reasons given are not applicable to the present case. In the present case it appears that there had been two trials in the circuit court before the present trial. On the first trial the plaintiff had verdict and judgment, which was reversed in this Court, and a new trial ordered. At that time the declaration did not allege gross negligence, and, under the intimation of this Court, plaintiff in the court below, after the case was remanded, amended his declaration by alleging the gross and wanton and reckless conduct of the defendant's servants and agents in the manner in which they kicked those cars backward across this highway. The cause was tried upon that issue, and Sweet, who had been examined as a witness upon the first trial, was again examined by the defendant. This trial resulted in a verdict for the plaintiff, and this verdict was subsequently set aside by the trial court. The present trial is the third one, and, Sweet not being present, the counsel for defendant proposed to read his testimony taken upon the first trial, and not upon the second. This was objected to by plaintiff's counsel, who claimed that the defendant was entitled to read the testimony taken upon the second trial, but not upon the first. This was so ruled by the court, and defendant's counsel read to the jury the testimony of Sweet taken upon the second trial. We find no error in this. The issue made by the amended declaration was quite different from that

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upon the first trial, and it appears that upon the second trial the witness was fully examined and cross-examined by counsel.

But we need not rest the question upon this reason alone. Mr. Sweet was one of the sectionmen of the defendant company. He lived a mile and a half from this crossing, and testified that it might have been two weeks before the accident since he had seen the crossing, and that it might have been used as a crossing, and that it probably was so used. He was called by the defendant for the purpose of showing that he was directed by the roadmaster to take up the crossing at the crossing C, and that he did so in the fall before, and notified Schupp and other teamsters not to cross there, and he so testified. The witness was fully examined and cross-examined on the second trial, under the issues then made, and the court was not in error in holding that the testimony given by him on the first trial, under the issues then made by the pleadings, could not be read in evidence by the defendant. We have looked into the record here containing the testimony of Luke Sweet on the first trial, and are satisfied that the defendant was not prejudiced by the court ruling it out. The testimony given by him on the second trial was as favorable to the defendant as that given by him on the first trial. In fact, it is substantially the same.

Some other errors are alleged, but we do not deem it important to notice them, and such as are not noticed herein are overruled. The oral arguments, in the main, were directed to the points which are here discussed.

We find no error in the record, and the judgment must be affirmed, with costs.

CHAMPLIN, C. J., and MCGRATH, J., concurred with LONG, J. MORSE, J., did not sit.

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CHAMPLIN, C. J. (*concurring*). In this case the plaintiff at the time of the injury was too young to be held accountable for the neglect to exercise due care and caution, but it is claimed that the negligence of the driver is imputable to the child. The leading case favoring the doctrine of imputed negligence is *Hartfield v. Roper*, 21 Wend. 615, and the leading case denying the doctrine is *Robinson v. Cone*, 22 Vt. 213. In the Hartfield case, Judge Cowen held that there was no evidence of any negligence on the part of the defendants, and this, of course, disposed of the plaintiff's right to recover. But he discussed the negligence of the child, who was about two years old, and of the parents in permitting it to stray into the public highway, where it was injured, and he laid down the doctrine that the negligence of the parents should be imputed to the child, and for that reason the child ought not to recover.

To my mind, the reasoning of the learned judge is not satisfactory. There is no principle of justice which demands that the fault or want of care of one person shall be imputed to another, who is without fault, or incapable of caring for himself, and thus excuse the fault or negligence of a person causing injury to an innocent party. The doctrine of imputed negligence punishes the innocent and permits the guilty to escape. It denies a remedy for a civil wrong done to an individual through the negligence of another, when the party injured was not in fault. There is no principle of public policy that requires that this should be done. Parents or guardians may be negligent of their duty towards their offspring or wards, but this should not be a reason for excusing the negligence of others towards innocent and unprotected children, or persons incapable of taking care of themselves.[1] It may be, and doubtless is, a sufficient

[1] See *Shippy v. Au Sable*, 85 Mich. 280.

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reason for not permitting the parent or guardian to recover damages to themselves for injuries caused by negligence, to which injuries they have contributed by their own negligence. I think the weight of modern authority is opposed to the doctrine of imputed negligence, some of which are the following: *Railroad Co. v. Hanlon*, 53 Ala. 70; *Railroad Co. v. Harris*, 67 Id. 6; *Cumming v. Railroad Co.*, 104 N. Y. 669 (10 N. E. Rep. 855); *Whirley v. Whiteman*, 1 Head, 610; *Railroad Co. v. Mahoney*, 57 Penn. St. 187; *Railway Co. v. Schuster*, 113 Id. 412 (6 Atl. Rep. 269); *Railway Co. v. McDonnell*, 43 Md. 534; *Railroad Co. v. Ormsby*, 27 Grat. 455; *Robinson v. Cone*, 22 Vt. 213; *Railway Co. v. Moore*, 59 Tex. 64. See, also, Whart. Neg. §§ 309–312; Whit. Smith, Neg. note to page 412 *et seq.*

Another branch of the same doctrine was that which imputed to the passenger the negligence of the driver of the vehicle, and it is sought to be applied in this case. This principle was laid down in *Thorogood v. Bryan*, 8 C. B. 115, which for a time was followed in the courts of England, and by some courts in this country. But the principle asserted was so at war with reason that it was followed under protest, and its correctness criticised, until recently it has been overthrown and discarded in England in the case of *The Bernina*, 12 Prob. Div. 58, after a full examination and careful consideration of all the authorities. And likewise the Supreme Court of the United States, after a thorough review of the American authorities in *Little v. Hackett*, 116 U. S. 366 (6 Sup. Ct. Rep. 391), held against the doctrine. This Court, in *Cuddy v. Horn*, 46 Mich. 596, refused to follow the doctrine of *Thorogood v. Bryan*. See, also, *Becke v. Railway Co.*, 102 Mo. 544, 9 Lawy. Rep. Ann. 157, and notes, for a collection of the authorities; *Railway Co. v. Eadie*,

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43 Ohio St. 91 (1 N. E. Rep. 519); *Transfer Co. v. Kelly* 36 Id. 86.

The jury having found that the defendant was guilty of reckless negligence, and the plaintiff not being of an age of accountability, I concur in the opinion of Mr. Justice LONG.

GRANT, J. *(dissenting).* I cannot concur with my brethren in the conclusion reached by them in this case. Even if, under the declaration and competent proofs, a case were made for the jury, still several grave errors were committed upon the trial, for which the judgment should be reversed.

1. One Sweet, a section foreman of the defendant, testified that, early in the fall of 1886, he notified all teamsters not to use the road on which the accident happened, and that afterwards he had notified no one except Mr. Schupp. A witness was recalled by plaintiff in rebuttal, and the following question was asked and answered under objection:

"*Q.* A man named Sweet has testified here that in December or January before this accident he notified several people who used that road crossing C not to use it any more. Did he ever notify you?

"*A.* No, sir."

This was error. It permitted the jury to draw the inference that the witness Sweet was impeached. Sweet had testified to no person or time covered by the question.

2. The witness Sweet had testified on the two preceding trials. The defendant offered his testimony taken upon the first trial, which was rejected by the court on the ground that defendant was entitled to read only the evidence taken upon the second trial. This testimony should have been admitted under the former ruling of

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this Court. *Labar v. Crane*, 56 Mich. 585. The facts in that case were the exact parallel of this.

3. Evidence of the failure to blow the whistle or to ring the bell, or the absence of a flagman at crossing C, was incompetent, because:

1. The absence of either had nothing to do with causing the accident. Schupp saw the cars approaching, stopped, and then, standing up, applied the whip to his team, and deliberately drove across in the mad attempt to beat the cars. Several persons standing in the vicinity witnessed the transaction, and all agree in this. The children who were behind Schupp's sleigh, some riding upon their sleds, and others hanging onto the rear of the sleigh, heard the noise of the cars, saw the danger, and readily avoided it. When one sees and knows the danger, signals become immaterial. They would have been of no benefit to Schupp, and manifestly would have given no warning to plaintiff.

2. The only ground of negligence upon which the plaintiff could, in any event, recover was in shunting these cars without any person upon them to control them.

3. There was no duty imposed upon the defendant to keep a flagman at this crossing. Only those who received freight at the warehouse had the right to use it.

But in the taking of testimony, in the plaintiff's requests to charge, and in the charge of the court, great prominence was given to the failure on the part of the defendant to blow a whistle, ring the bell, or station a flagman. This testimony was incompetent. It is too plain for argument that it would influence the jury. If the defendant had men upon these cars as they were shunted back, then the verdict should clearly have been for the defendant.

4. The court left it to the jury to determine whether Schupp was guilty of negligence. It should have instructed them that he was guilty not only of negligence, but of gross negligence. He was plaintiff's witness, and testified that he saw the cars, and tried to drive across

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ahead of them. This error was not cured by the finding of the jury that Schupp, by reasonable care, could have avoided the accident.

5. The court instructed the jury that he—

"Should not lay down to them any particular rule as to what duty the railroad owed the plaintiff, as to whether they ought to have provided a watchman or brakeman or lookout in the rear of the caboose, or whether they should have had more or less hands upon the train, or whether they should have sounded the whistle or rang the bell. * * * I have been requested to charge you as to the particular negligence that this company would have to be guilty of in order to be liable, but upon that branch of the case, as I stated to you earlier in the charge, I cannot and shall not pass, but leave to you. It is not for me to say that any accident happened because a bell was not rung, because a warning was not given, because a man was not stationed upon the rear of the caboose, nor any of those matters. It is for you to say whether any of those, or all of them, —it may be any or all or any part of them,—contributed to the injury. Then, if you think they did, if the bell was not rung (and that is for you to say), and that it contributed to the injury, if no lookout was placed on the cars where he ought to have been, if you find there was not, and that contributed to the injury, if nobody was upon the rear of the caboose, and that contributed to the injury, any or all of them,—whether these things happened,—you are to say, and not me."

The charge contains other language of like import. It was the clear duty of the court to instruct the jury as to what duty the defendant owed the plaintiff, and it should have instructed them that the failure to sound the whistle or ring the bell or post a flagman was of no consequence. Furthermore, this charge was erroneous, in that there was no evidence that the train was not properly manned with competent employés, nor was there any evidence that it was necessary to station a watchman on the rear of the caboose. The court should also have instructed the jury as to the sole act of negligence upon

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which the right of recovery rested. As was said by Mr. Justice CAMPBELL in this case (77 Mich. 155),—

"It is not competent for a court to allow a mass of testimony to go before a jury, and leave them to decide, each for himself, what is legal negligence and what is not."

It is impossible to tell from the record in this case whether the jury found the defendant guilty for failure to blow the whistle, or to ring the bell, or station a flagman or a watchman upon the rear of the caboose, or the failure to have men upon the cars, or the failure to give warning.

6. The charge of the court was very voluminous, covering 27 pages. In the first 11 pages not a word is said to the jury about gross negligence, but it discusses the question of ordinary negligence. He closed this part of his charge by saying,—

"The first question for you to pass upon is, was this defendant guilty of negligence, under the rules I have laid down?" and then continued: "If you find from the evidence that the plaintiff was not in sight either in the sleigh of Schupp, or was not seen by the servants of the defendant in the sleigh of Schupp, or in such proximity to the track as would give them reasonable apprehension that he would be crossing it, then, Schupp knowing the circumstances there, and that these cars were liable to be kicked back onto Sunday Lake spur, he would be charged with knowledge of that fact, and would be guilty of negligence under those circumstances, and the company would not be liable unless they were guilty of gross and wanton negligence. I don't mean by that that they would have to be guilty of an intention to injure any one, but they would have to be guilty of that degree of negligence that would show an utter recklessness or disregard to the safety of the people upon the track."

This is all the language in the charge referring to gross and wanton negligence. I am unable to hold that in law the defendant has had a fair and impartial trial

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where the court has given no other instruction than this upon gross and wanton negligence, without finding which the jury must have rendered a verdict for the defendant, and where the court directed so much attention to other acts of the defendant, which had no bearing whatever upon its liability. The jury found that the defendant had no knowledge that plaintiff was in the sleigh of Schupp. The jury could not well have found otherwise, for there was no evidence tending to show that the defendant did know it. Which one of these alleged acts, therefore, was it upon which the jury based the verdict of gross and reckless conduct? They were left to roam at will in search of some fact upon which to base some degree of negligence.

7. The court, in closing its charge, used this language:

"I think I have stated to the jury—if I have not, I do now state to them—that, in case the railroad compeny's servants in charge of that train saw these children and the plaintiff, Arthur Schindler, in the sleigh of Schupp, under such circumstances as they might reasonably expect them to cross that track, then they owed a duty to the child such as would be reasonable and prudent under these circumstances, he being a child; and the negligence of Schupp, under those circumstances, would not necessarily defeat a recovery by the child. I understand that I have charged that, and I think you will find it almost in that language."

No circumstances were shown by which defendant's employés could reasonably have expected plaintiff upon the crossing.

8. But, under the facts in this case, I do not think the plaintiff has made out a case for recovery. The present record differs in no essential particulars from that in 77 Mich. 136, and I entirely concur with the conclusion then reached by Mr. Justice CAMPBELL. As already stated, recovery can only be based upon proof of gross

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negligence and reckless conduct on the part of the defendant. To maintain this, it was necessary for plaintiff to prove that defendant's employés knew, or should have known, that plaintiff was liable to be at that time riding upon Schupp's sleigh, and that Schupp would commit the crazy act of attempting to beat the cars when he saw them coming. It was not grossly negligent in the defendant to shunt the three cars back upon its spur track without any of its employés upon them, unless there was a probability that some person of age and discretion might, in the exercise of ordinary care, be upon the crossing when the cars reached it, or that an infant not chargeable with negligence was liable to be there. Now, assuming, under plaintiff's theory, that the brakeman separated the cars at some point west of the crossing, and that neither he nor Conductor Cole was upon the cars as they went back, in what does this act of gross negligence consist? Schupp had a clear view of the situation; so, also, did the brakeman. No children were near the track. As the situation then was, no one had time or opportunity to be upon the crossing C when the cars reached there, except by his own gross negligence, or by the gross negligence of Schupp. Clearly, this defendant cannot be held liable under these circumstances, unless its employés were chargeable with the knowledge that Schupp was liable to commit so crazy and reckless an act, and also that plaintiff was liable to be in his sleigh. It owed no duty to Schupp. How can it owe a duty to one of whose existence it was not aware?

It is significant that all the witnesses who stood in the vicinity, and saw the whole transaction, some of them from the time Schupp left the warehouse, aside from the children who were behind the sleigh, did not see the plaintiff upon the sleigh, and had no intimation he was there until the accident happened. Schupp himself did

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not know he was there, for, as he started from the warehouse, he drove the children away with his whip, and took the plaintiff out, and set him down upon the snow. One of the larger children picked him up, and sat him down in a vacant place behind the beer kegs in the hind part of the sleigh. I find no principle of law or justice upon which defendant, through its employés, can be held liable for the knowledge of facts which others, having equal facilities, did not see. Furthermore, there is no pretense that the trainmen had ever seen the children of the village riding upon these sleighs. There was no direct evidence that even the station agent had seen it; but, if he had, the legal inference would be that they were riding by permission of the driver, under whose care and control they would then be. Upon this branch of the case, the court instructed the jury as follows:

"And in this case I submit this question of negligence and contributory negligence to you upon two propositions. If you find in this case that the agents or servants of this defendant in charge of that train on that day did not see the child either in the sleigh of Schupp, as he was moving to cross the track, or so near the track as to give them reasonable apprehension that he was crossing it or in danger of crossing the track, then this case is governed by the question of the negligence of Schupp. That is, if they did not see the child either in his sleigh, or see him anywhere about the grounds, under circumstances that would lead them to infer they might be crossing the track, had no knowledge that the child was there at all, nor reason to expect him there, in that case then the question would be governed by the negligence of Schupp, and, if he was negligent under the rules I have laid down to you, the plaintiff cannot recover; for, if they had no knowledge of the boy's presence in close proximity to the track, if they had a man stationed at the train where he could have seen, and the boy was in such situation he could not be seen, then, if there is negligence on the part of Schupp, the boy being in that sleigh, riding with him, the defendant having no knowledge that he was there, Schupp's negligence would be

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such as would control this case, if Schupp was negligent, because Schupp and every man in his senses, and a man who was, as Schupp is proven to have been, familiar with the running of trains there, with that ground, and the liability of cars being kicked onto Sunday Lake spur, is presumed to use his reasonable senses; and under the rules that I have given you, and shall give you further on, if he was negligent, then the boy would have to suffer for it, because the company would not be obliged to look out for something that they could not see or anticipate."

Again, there is no evidence that the accident could have been avoided, even if the conductor and brakeman had been upon the cars. They would have been under no obligation to attempt to stop the cars until they had seen the determination on the part of Schupp to attempt to cross first.

9. In view of the special findings of the jury, it is proper to note the evidence *on the one* act of negligence necessary to be proven, namely, were there persons upon the cars sufficient to control them? If they were there, then no question is raised but that they used the necessary precaution; nor is it claimed that two were not sufficient. The testimony on the part of the plaintiff was of a negative character, namely, that witnesses did not see any one upon the cars. One Bedell testified that there was no one upon the top of the rear cars as they went backwards; that he saw the brakeman, Durkie, uncouple them standing upon the ground; that as soon as they were uncoupled the rest of the train hid Durkie from his sight. On cross-examination, he said he would not swear that there was no one on the cars, and both upon a former trial, as well as upon this, he said he paid no particular attention to see whether anybody was on the cars or not. One Murphy testified that he came out of his saloon, and saw the cars moving back; that he

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could not see anybody on the cars, but would not swear there was no one. Schupp testified that there was nobody on the cars. This comprises all the evidence tending to show that there was no one upon the cars.

For the defendant, Conductor Cole testified that he was on the front end of the caboose, and went there for the purpose of handling the brakes; that, hearing some one halloo, he applied the brakes, and, looking out, saw Schupp's mules just pass the cars in the road, standing up. Brakeman Durkie testified that he uncoupled the cars, and immediately climbed upon them, and saw Schupp coming, and hallooed to him to stop, and immediately applied the brakes. Walter Lobb, a disinterested witness, testified that he saw Durkie cut the cars off, go up on them, and ride them down the track; that he saw Schupp, and hallooed to him; and also testified that he saw Mr. Cole on the front of the caboose. Thomas Gallagher, a disinterested witness, also testified that he heard the brakeman halloo to Schupp not to cross the track, and that the brakeman was on top of the car.

In view of this testimony, does it not seem quite probable that the jury found the gross negligence to consist of some other act than the failure to have men upon these cars?

It is claimed that there was evidence on the part of one Orr, a witness for the plaintiff, tending to show that Conductor Cole was in a saloon drinking with him at the time the cars were shunted back. The testimony of Mr. Orr does not sustain the claim. This saloon belonged to one O'Brien, and is marked upon the plat. Orr says that Cole drank with him in the saloon shortly after the train came in; that after they came out the train started back, and he did not see Cole again until after the

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accident. He went to another saloon, and when he came out the accident had occurred. There is no testimony that Cole did not have ample time to reach the train as it was coming back.

10. The judgment should not stand, for another reason. The jury found, in reply to a special question, that the view of the cars as they were backed down was obstructed from the time Schupp left the beer-house until he reached the crossing C. Not only was there no testimony upon which to base such a finding, but it was directly contrary to the fact. The testimony of all the witnesses, both on the part of plaintiff and of defendant, was that the view was unobstructed. Schupp testified: "When I was on the sleigh I could see all over there; there was nothing to hide my view." As already stated, the children saw the danger, and avoided it. No verdict ought in justice to stand in the face of such finding.

11. The answer to the fourth question is not conclusive upon the defendant. The question was undoubtedly drawn, and very properly, for the purpose of calling the attention of the jury to the one fact, without finding which there could be no recovery. They readily found that defendant's trainmen "did not care whether they ran the plaintiff down or not." There is nothing in this case, in my judgment, on which such a finding can be based. It virtually finds those trainmen, whose alleged duty it was to be upon the cars, guilty of manslaughter, and that in the face of the fact that no person could have been upon that crossing at the time the cars reached there, except by his own gross negligence, or the equally gross negligence of Schupp. Does the law hold a man guilty of not caring whether he runs down and kills another, when there is nothing in the circumstances or

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surroundings to inform him that his act may result in the death of one of his fellowmen?

There were other important questions involved in the case which it is unimportant to discuss.

Judgment should be reversed, with costs, and a new trial ordered.

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THOMAS GRISTOCK v. THE ROYAL INSURANCE COMPANY.

[See 84 Mich. 161.]

Fire insurance—Oral application—Waiver—Proofs of loss.

1. The applicant for insurance has a right to rely upon the assumption that his policy will be in accordance with his oral application, and, if the insurer desires to make the policy in anything different, it must, in order to make it binding upon the assured, call his attention to the clauses differing from the application.
2. After a careful examination of this case as presented on the rehearing, no reason is seen for reversing the former decision, which is fully reported in 84 Mich. 161.

Rehearing, on application of defendant, of case reported in 84 Mich. 161. Argued June 2, 1891. Decided July 28, 1891. The facts are stated in the former opinion, which is affirmed.

Norris & Norris, for appellant.

Spaulding & Walbridge and *Griswold & High,* for plaintiff.

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GRANT, J. The learned counsel for the defendant in their brief on this hearing insist that certain clauses of the policy were omitted in the former opinion (84 Mich. 161), and that similar clauses were never before passed upon in this Court. The first clause referred to is the one containing conditions as to mortgage. The policy provided that the company should not be liable—

"If the property * * * is or shall become mortgaged * * * without the assured's written notice to, and without the written permission of, this company indorsed on this policy."

In such case the policy was to be void. As stated in the former opinion, there was no written application, and defendant's agent was informed by the plaintiff of the mortgage existing upon the property. In obtaining this insurance, this agent represented the defendant, and not the plaintiff. The plaintiff had concealed nothing, but, on the contrary, had disclosed to the defendant, through its agent, the exact condition of the property. In *O'Brien v. Insurance Co.*, 52 Mich. 131, the policy provided that the company should not be liable *if there was any omission* by the assured of the title, incumbrance, etc. The assured had made no statement in regard to any mortgage, although the agent testified that, according to his recollection, he asked him about it. The Court say:

"The circuit judge charged the jury, in substance, that if they found that the policy was not read to the plaintiff before it was delivered to him, and that the agent gave it to him on his oral application, without directing his attention to the conditions respecting incumbrance, and that the plaintiff, on receiving the policy, was ignorant of them, and that nothing was said, either by the agent or the plaintiff, before or after the emanation of the policy, they might then consider the existence of the mortgage as no impediment to recovery."

This charge was sustained, and the Court add:

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"If the applicant is guilty of no misleading conduct, the insurer in such a case must be taken to assume the risk incident to the undisclosed incumbrance."

Why, with the more reason, should it not be held to assume the risk of a disclosed incumbrance, which, for some reason, it has not seen fit to indorse upon the policy? The only difference between that case and this one is that this policy required a written notice by the assured, and permission to be indorsed upon the policy. But, if the attention of the assured in that case had been called to the condition, it would as certainly have avoided his policy as would the clause now under consideration. The principle is the same in both cases, and both must be governed by the same rule. Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different, it should, in order to make it binding upon plaintiff, under the authorities in this State, have called his attention to those clauses which differed from the oral application. It was held in *Crouse v. Insurance Co.*, 79 Mich. 249:

"The restriction upon the agent, being in the policy and not in the application, cannot be construed to refer to the acts or knowledge of the agent prior to the delivery of the policy."

In that case there was a written application, in which there was an absolute misrepresentation by the assured as to the condition of the property. By the very terms of the policy, it was rendered void if the assured was not the sole, absolute, unconditional owner of the property, and if that fact was not expressed in the written portion of the policy. It was also expressly covenanted that any waiver, to be valid, must be indorsed upon the policy. The assured had correctly stated to the agent who wrote

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out the application the condition of the title, but the agent had failed to put it in the application. The terms of that policy were as strong and explicit as are the terms of the one here involved. A reading of the policy in that case would have shown the assured that his title was not "expressed in the written portion of the policy," and that this, by its terms, rendered the policy void. That case, in my judgment, clearly rules the present one.

We deem it unnecessary to discuss again the questions of appraisal and award and the waiver involved. The acts of the adjuster, Stark, whose general authority was ample to adjust the loss, were binding upon the defendant. The law does not require unnecessary things to be done. So far as the plaintiff and the adjuster had agreed upon the amount of the loss, this dispensed with the necessity for any formal proofs. So far as the loss on the house was concerned, this they had agreed to arbitrate. But the defendant failed to perform its agreement in this respect, and then denied all liability. The concession made upon the trial as to the adjuster's authority is stated in the former opinion. If his authority was limited, this was not known to the plaintiff's agent until he had received the letter of December 12, after the time limited for making the proofs had expired. During the time spent in examining and adjusting the loss, the adjuster said nothing about making the proofs called for by the policy. After agreeing to the arbitration, he wrote on October 29 to Faxon, defendant's local agent, saying that other losses would demand his attention for perhaps 10 days, and that he would then notify Faxon, or perhaps surprise him some fine morning by dropping in on him without notice, and adds:

"Kindly notify Mr. Gristock of the change in plan, but say nothing of surprising him. Keep your eyes wide open, and please make memorandum of any information

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you may receive, and also give me all the information."

Mr. Faxon notified the plaintiff's agent as requested. The agent inquired of Faxon if it would be necessary for him to make out the proofs of loss required by the policy, to which Faxon replied that it would not, There is no intimation upon the record that the loss was not an honest one. Whatever the purpose of the defendant's agents was, the effect was to mislead plaintiff's agent, who apparently acted in the utmost good faith. It would, in my judgment, be a reproach upon the law to hold that, under these circumstances, the defendant was not estopped from insisting upon the written condition of its policy, requiring a waiver to be indorsed upon the policy, and signed by the agent making it. It was my own opinion, upon the former hearing, that the court should have instructed the jury that this condition of the policy was waived; but my brethren thought that the question was properly submitted to the jury, in which opinion I finally concurred. I see no reason, after a careful examination, why our former decision should be reversed.

MORSE, MCGRATH, and LONG, JJ., concurred with GRANT, J.

CHAMPLIN, C. J. *(dissenting).* The question in this case, to my mind, turns upon the rights of the parties under the contract of insurance, and is raised under the following provisions contained in the policy:

"12. The assured, under this policy, sustaining loss or damage by fire, shall forthwith give notice in writing of said loss to the company, and shall within 30 days of date of said fire render a particular account of such loss, signed and sworn to by the said assured. Failing so to do within 30 days, this insurance shall become and be null and void. Such account shall state whether any and what other insurance has been made covering the property herein described, giving copies of the written portions of all policies thereon; stating also the actual

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cash value of the property, and the interest of the assured therein, and for what purpose and by whom the buildings herein described, or containing the property herein specified, and the several parts thereof, were used at the time of the fire; when and how the fire originated; and shall also, if required, produce a confirmatory certificate of the chief of the fire department, or his assistant, or, if no fire department exists in the locality, then a certificate, under the hand and seal of a magistrate (nearest the place of the fire), not concerned in the loss, as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, and knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained the loss on the property herein specified to the extent alleged in such account.

"13. When the property herein described, whether real or personal, is damaged as the result of fire, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made of the whole, and furnish the same to the company, naming the quantity, quality, and cost of each article. The assured shall, if required, remove all worthless *débris* or remains. The amount of sound value and of the damage shall then be determined by mutual agreement between the company and the assured; or, failing thus to agree, the assured hereby covenants that the same shall then be immediately ascertained by a detailed appraisal by competent persons not interested in the loss as creditors or otherwise, nor related to the assured, one to be appointed by the assured, and one by the company (which two persons shall, in case of disagreement, appoint a third, which third appraiser, if chosen, shall be authorized to appraise, acting conjointly with the other appraisers, upon such items only as such first appraisers may disagree upon), and their award, or the award of any two of them, rendered in detail in writing, and made under oath, shall be binding upon the company and the assured as to the amount of such loss or damage, but shall not decide the legal liability of the company under this policy. One-half of the appraisers' fees shall be paid by the assured.

"14. The assured shall, if required by any person

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appointed by the company, either before or after furnishing the proofs of loss herein required, submit to an examination or examinations under oath, and subscribe to an account of such examination or examinations when reduced to writing, and also produce all books of account, bills, invoices, or vouchers concerning the property in question, and lodge the same with such person at the office of the company, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices the originals of which have been lost, and shall exhibit all that remains of the property herein described, damaged or not damaged. If the claim be for a building destroyed or damaged by fire, the assured, if required so to do, shall, as a part of the proofs of loss, furnish the company with plans and specifications of such buildings, and shall consent to an appraisal of loss or damage to said building, as above provided. And until such notice aforesaid is given, particular account and certificate produced, examinations and appraisals be had, and plans and specifications be furnished, the loss shall not be payable.

"15. The company reserves the option to take the whole or any part of the movable or other property herein specified at its appraised value, or to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within 60 days after the receipt of the proofs of loss herein required. * * * And any failure or neglect to fully comply with all the requirements of this policy, as specified, shall entail forfeiture of all claim, and shall be a complete bar to any recovery for loss under this policy.

"16. The insurance under this policy is made subject to the following conditions, limitations, and requirements, and to the classes of hazards and *memoranda* printed on the back of this policy, which are hereby made a part hereof; and the assured, by the acceptance of this policy, agrees to all of the conditions and requirements thereof.

"And it is hereby expressly provided that no suit or action against this company for the recovery of any claim, under or by virtue of this policy, shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next

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after the fire shall have occurred; and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation or other law to the contrary notwithstanding. * *

"Agents of this company shall have the right of free access to the *débris* of property herein described, which may be damaged as the result of fire, and to the premises of the assured, for the purpose of investigating any claim or assumed claim under this policy; and no examination of assured, and no action whatsoever taken by the company so to investigate the same, and no opinion expressed as to liability, shall operate as a waiver of any rights of this company, or be held to be any admission of liability under this policy."

Then this contract also contained the following express agreements: The amount of loss—

"To be paid after the loss shall have been ascertained in accordance with the terms and conditions of this policy, and satisfactory proofs of the same shall have been made by the assured, and received at the office of the company."

"Agents have no authority to bind this company, except strictly in accordance with the terms, conditions, limitations, requirements, and the actual issue of this policy; nor shall any knowledge, act, or statement of any agent of this company be held or claimed to have waived any of the conditions or stipulations of this policy, unless waiver be indorsed hereon in writing, and be signed by such agent; and this company shall not be liable for indemnity, except as herein specified."

There is nothing in the policy of the law which precludes parties *sui juris* from entering into contracts of insurance containing the foregoing stipulations, and there is no reason why the contract embraced in the policy of insurance should not be enforced by courts to the same extent, and under the same rules of construction, as other valid contracts. There is usually an element of misfortune which naturally excites sympathy on behalf of the

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assured, and there are many stringent and technical conditions inserted in such contracts which have a tendency to prejudice the fair-minded against the insurer; but of necessity, owing to attempts at fraud on the part of the assured, and the difficulty of establishing misconduct of the assured (the insurers in some cases being absent a long distance from the scene of the fire), the insurance companies have been compelled for their own protection, and the protection of honest policy-holders, to insert in the policy such provisions as they deem best suited to guard themselves against the cupidity and dishonesty of persons who insure for the purpose of burning the property insured, and collecting the loss from the insurers. It is apparent that all the investigation the company can make as to the extent of the losses or causes of the fire must be after the fire has occurred; and if they are to be held liable because they have instituted any investigation relative to the loss, and of its extent, or the origin of the fire, then they had better issue a policy without any conditions, and merely agree that they will pay all losses in the event of fire, however dishonest the assured may be in effecting the insurance, or burning the property after the insurance is effected.

Courts have construed the acts of the companies, when seeking to ascertain the cause and extent of loss, as a waiver of the express conditions of the policies relative to furnishing proofs of loss and of the cause of the fire, so that these conditions have been rendered useless or nugatory, and the companies have been compelled so to mould their contracts as to permit such investigation, and require the active assistance of the assured, and require the express agreement that such investigation, appraisal, and award shall not be deemed a waiver of the other conditions of the policy, and that no act or statement of the agent shall be held or claimed to be a

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waiver of any of the conditions or stipulations of the policy unless indorsed in writing on the policy. This policy contains the express stipulation that—

"Agents of this company shall have the right of free access to the *débris* of property herein described, which may be damaged as the result of fire, and to the premises of the assured, for the purpose of investigating any claim or assumed claim under this policy; and no examination of assured, and no action whatsoever taken by the company so to investigate the same, and no opinion expressed as to liability, shall operate as a waiver of any rights of this company, or be held to be any admission of liability under this policy."

The testimony is undisputed that the adjuster of the company, and the son of Mr. Gristock, acting for him, had agreed upon and adjusted the losses upon all the personal property destroyed, and were unable to agree upon the value of the building, and this they were to leave to arbitration, under the conditions of the policy. This policy requires proofs of loss and the circumstances of the fire to be made and delivered to the company within 30 days. The act of the adjuster is independent of this requirement. The object is to ascertain the extent and amount of losses, but not in any way to affect the liability of the company to pay the amount of such losses. This liability does not depend upon the amount of the loss, but upon the terms and conditions of the policy under which it agreed to be liable. The adjustment and the arbitration may be made after the 30 days limited within which the proofs of loss shall be made. Before the arrangements in reference to the award had been completed, the adjuster was called away. A time was mentioned when he would return, which was within the 30 days within which proofs of loss should be furnished according to the terms of the policy. Before the day arrived he sent word that he should be detained, and

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could not be there at the time fixed, and no other time was named, and he did not again return. The time limited for the filing of proofs of loss was suffered by the assured to expire, and none were furnished; and the question is, were the acts of the adjuster a waiver of such proofs of loss by the company? It is not claimed that there was any express authority conferred upon the adjuster to waive the condition requiring proofs of loss to be filed within 30 days, nor is it claimed that the adjuster made use of any language which assumed to waive such proofs.

It is claimed that the adjuster by his acts had lulled the assured into the belief that no proofs of loss would be required,—that the adjustment and appraisal would take the place of and do away with the necessity of such proofs; or that, at any rate, in fairness to the assured, the adjuster or agent should have told the assured that he must furnish the proofs within the 30 days at his peril, and, not having done so, it would be unjust to deprive the party of his remedy for the non-compliance with that condition. The vital point, assuming the adjuster had power to waive (which is not shown), is, was the assured lulled into non-action, and neglected to furnish proofs of loss, because of what had transpired, such action inducing the belief in his mind that it was not necessary to furnish them within the time limited? The facts are decidedly against the plaintiff upon this point. Instead of being lulled into security, relying upon the acts of the adjuster and upon what had been done, he sought and obtained legal advice as to whether he was required, in view of what had been done, to furnish proofs of loss within the 30 days, and he states that he was advised that he was not. He did not, however, as appears by the record, show to his attorney the contract between him and defendant, but received his advice

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upon his statement to him; so that, instead of having been misled to his injury by the defendant or its agents, he relied upon the advice derived from his own attorney, upon his own statement of the facts. To me it savors of injustice to hold that the defendant was estopped by its conduct, or had waived the rights secured to it by the contract, under such a state of facts. It cannot be urged that the insurance was so recent that plaintiff had not had an opportunity to inspect the policy, as it appears that he had held a policy in this company prior to this, and for which this was a renewal.

The judgment should be reversed.

ALFRED DAVIES ET AL. v. THE CITY OF SAGINAW AND JAMES F. BROWN, TREASURER.

Municipal corporations — Public improvements — Assessment — Construction of charter.

1. The judgment of a city council upon a question of parliamentary law will not be disturbed by the courts.
2. The declaration of the necessity for a public improvement does not necessarily involve the enumeration of its details, but, although general in character, covers the doing of whatever is deemed or found to be necessary in the course of an improvement of the character designated.
3. After the common council of a city had ordered a street to be paved, and had approved the plans and specifications for the improvement, and the board of public works had advertised for proposals for doing the work, the council adopted the report of a committee recommending that the letting of a contract be deferred until provision was made for sewerage, and, after bids had been received under the advertisement, the council adopted a resolution directing the board to readvertise

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for proposals, which was not done, but the board reported the bid received, and the council directed it to enter into a contract with the bidders. And it is held that the council had power to suspend, defer, or postpone the work, and to resume it as well, the exercise of which power was entirely within its discretion, without reference to the reason which led to such postponement.

4. In matters involving the discretion or judgment of a common council, where no bad faith or fraud is alleged, parties cannot go behind the recorded vote to show either want of knowledge or of good judgment.

5. The validity of a special assessment does not depend upon the fact whether or not the members of the council have viewed the property assessed, or the assessment district, with reference to that particular action.

6. Aldermen are supposed to have a general knowledge of the geography, as well as the topography, of their own city, and to know the location and condition of its streets, and are supposed to act upon information furnished by committees, whose duty it is to collect *data* and arrange details.

7. The validity of a special assessment is not affected by the fact that the assessor or city engineer furnished the information or *data* upon which the council acted, or because the officers actually outlined the assessment district, provided their action was adopted, approved, and confirmed by the council; citing *Cuming v. Grand Rapids*, 46 Mich. 150, 158; *Baisch v. Grand Rapids*, 84 Id. 666.

8. The resolution of the common council fixing the assessment district, and declaring the amount to be assessed thereon, for a special improvement, is a legal determination (under a charter authorizing such action) that the benefit conferred upon that district is equal to said amount, and the spreading of such sum upon the assessment roll, and the confirmation of the roll by the council, determines that the proportion of the aggregate benefit received by each parcel is equal to the burden imposed; and, in the absence of fraud, oppression, or manifest mistake, such determinations are conclusive.

9. The proceedings of the common council recited that the amount assessed to a street-car company on account of paving a street represented the cost of paving between the company's tracks, pursuant to the provisions of a specified section of an ordinance authorizing the location and maintenance of the company. And it is held that, as the ordinance is not set forth in the record, it will be presumed that by its terms the company

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was liable to the assessment ordered, rather than upon the basis of benefits derived from the improvements.

Appeal from Saginaw. (Gage, J.) Argued June 20, 1891. Decided July 28, 1891.

Bill to restrain the collection of a special assessment. Defendants appeal. Decree reversed and bill dismissed. The facts are stated in the opinion.

Lawson C. Holden, for complainants, contended:

1. The "uniform rule" applied by the council and assessor in establishing the assessment district, by taking just half a block each side of an improved street, was arbitrary; and the testimony shows that the making of the assessment was equally arbitrary. Inasmuch as the Legislature has not provided that the assessment shall be according to frontage, area, or the value of the land, it cannot be made on any such basis. The charter provides that it shall be "in proportion to the benefit and advantage which said person or description of property is by the assessor deemed to acquire from the making of said improvement;" and this requires a *personal* examination of the improvements and lands to be made; citing *Hoyt v. East Saginaw*, 19 Mich. 43; *Warren v. Grand Haven*, 30 Id. 29; *White v. Saginaw*, 67 Id. 42; *State v. Hudson*, 27 N. J. Law, 214, 29 Id. 104, 115; *State v. Bergen*, Id 266; Cooley, Tax'n, 177, 454.
2. The true theory of special assessments is that the owner of the property shall neither make nor lose by the improvement. His property should be specially assessed to the amount of the benefit which it receives more than the property of citizens generally receive. He should pay extra for what he gets extra, but should never be required to pay a sum in excess of the enhanced value of his property. If he is not required to pay specially to the full amount of the special benefit he receives, it will be an injustice to the public, and, if compelled to pay for a greater benefit than he has received, it is an injustice to him, of which he may complain. It is the condemnation of his private property to the public use without just compensation; citing *Williams v. Detroit*, 2 Mich. 560; *Warren v. Grand Haven*, 30 Id. 24; *Thomas v. Gain*, 35 Id. 155; *Hanscom v. Omaha*, 11 Neb. 37; *Dyar v. Farmington*, 70 Me. 527; *Zoeller v. Kellogg*, 4 Mo. App. 168; *Lockwood v. St. Louis*, 24 Mo. 20; *Chamberlain v. Cleveland*, 34 Ohio St. 551; *Ottawa v. Spencer*, 40 Ill. 211; *Bedard v. Hall*, 44 Id. 91;

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Wright v. Chicago, 46 Id. 44; *St. John v. E. St. Louis*, 50 Id. 92; *Kirby v. Shaw*, 19 Penn St. 258; *Schenley v. Com.*, 36 Id. 29, 57; *McGonigle v. Allegheny*, 44 Id. 118; *In re Washington Avenue*, 69 Id. 360; *Pray v. Northern Liberties*, 31 Id. 69; *Wright v. Boston*, 9 Cush. 233; *Litchfield v. Vernon*, 41 N. Y. 123; *In re Street Opening*, 20 La. Ann. 497; *Allen v. Drew*, 44 Vt. 174; *Paterson v. Society*, 24 N. J. Law, 400; *State v. Newark*, 27 Id. 190; *In re Drainage of Lands*, 35 Id. 497; *State v. Jersey City*, 43 Id. 135; *In re Mayor*, 11 Johns. 80; *Watkins v. Zwietusch*, 47 Wis. 513; *State v. Ramsey Co.*, 29 Minn. 62; *Bradley v. McAtee*, 7 Bush, 672; *Creighton v. Manson*, 27 Cal. 613; *In re Market Street*, 49 Id. 546; *In re Fourth Avenue*, 8 Wend. 452; Cooley, Tax'n, 431, 459; Desty, Tax'n, 1237.

James H. Davitt, for defendants.

McGRATH, J. Complainants file their bill to restrain the collection of an assessment for paving Genesee avenue from Hoyt to Hartsuff streets.

On the 6th of September, 1886, the council declared the paving of said avenue "with sapless cedar blocks, to rest upon sound pine boards, laid upon a bed of sand or gravel not less than three inches in depth, prepared on the subgrade of the street to receive the same, the pavement itself to be curbed the whole length of each side thereof with stone curb securely set in a bed of bank sand or gravel, and, when complete, to be covered with a dressing of gravel, all in conformity to details, plans, and specifications therefor, to be hereafter prepared by the board of public works, and adopted by this council," to be a necessary public improvement, and ordered the street to be so paved, directing the board of public works to prepare plans and specifications for said work, and also to determine the particular kind of material, and furnish an estimate in detail of the probable cost and expense of the improvement. The board of public works reported the plans and estimates to the council, January 17, 1887, and the same were referred to the proper committee, which committee reported on January 24, 1887,

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recommending the approval of the same, and also recommending the placing of a tile subdrain under the curbstone, on each side of the pavement, representing that the cost thereof would be about six cents per lineal foot. The council adopted the recommendation of the committee, and approved the plans, specifications, and estimates. On February 7, 1887, complainants, with others, presented to the council a written remonstrance, protesting against the assessment of the cost of the tile drain, recommended by the committee as aforesaid, against the particular improvement district, and claiming that the expense should be borne by the city at large. The remonstrance was referred to the committees on paving and sewers, who reported that the district should bear the expense, and not the city at large, which report was concurred in by the council.

On February 14, 1887, the board of public works sent a communication to the council, suggesting the advisability of postponing the paving "until provision be had for the proper drainage of the street," and that it would be well for the council to consider the question before the contract is let, "proposals for which will be received next week." This communication was referred to the committee on sewers and the committee on paving, which committees reported on February 21, 1887, that "they are of the opinion that the letting of said contract had better be deferred until such time as provision is made for the disposal of the surplus water, either by sewers or otherwise." The recommendation of the committees was adopted. Nothing further was done in the matter until April 5. In the mean time the board of public works had received bids for the work, which were afterwards returned unopened to the bidders. Upon the last-named date, the council adopted the following resolution:

"*Resolved*, that the board of public works be and they

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are directed to advertise for proposals for the paving of Genesee avenue, from Hoyt to Hartsuff streets, in accordance with the plans and specifications heretofore adopted."

On May 2, 1887, the board of public works reported the bid of Scanlan & Crowley for the paving of Genesee avenue, and recommended that the same be accepted, "provided the council are satisfied that the prices given are reasonable." The following action of the council was had thereon:

"Ald. Comstock moved that the bid of Scanlan & Crowley for paving Genesee avenue, from Hoyt to Hartsuff streets, be referred back to the board of public works, with instructions to readvertise for proposals for such improvement.

"Ald. Becker moved, as an amendment, that the board of public works be instructed to contract with Scanlan & Crowley in accordance with their said proposal.

"Ald. Maier moved, as a substitute, that the matter be referred to the committee on paving. Substitute lost.

"The question was then had on the amendment of Ald. Becker. The same was carried by a vote of 10 ayes to 6 nays."

It is claimed that this action was a nullity, for the reason that, after the adoption of Ald. Becker's amendment, the original motion as amended was not put. But Ald. Becker's amendment was in fact a substitute, and it was unnecessary to put the original motion, although that is a question of parliamentary law, the judgment of the council upon which the courts will not disturb.

The said Scanlan & Crowley proceeded under said contract and direction of the board of public works, and paved said street. At a regular meeting of the council held September 26, 1887, the city clerk reported to the council that the city engineer had filed in his office detailed estimates of the cost and expense of paving Genesee avenue from Hoyt to Hartsuff streets, giving the said estimates in detail. The estimate shows the

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total cost, the amount to be paid by the street railway, the amount to be paid by the city for intersections, and the amount to be assessed upon the property benefited. At a meeting of the common council held October 3, 1887, the following resolution was adopted:

"*Resolved*, that the committee on taxes and assessments and city attorney be, and they are hereby, directed to examine and report to this council a list of the lots, blocks, and parcels of real estate which, in their opinion, are benefited by, and which should be assessed for the cost of, the improvement by paving, etc., of Genesee avenue from Hoyt to Hartsuff streets."

At a meeting held October 10, 1887, the committee on taxes and assessments, and the assessor on tax district, reported such certain lots and blocks as in their opinion would be benefited by such improvement, and recommended that the lots and blocks described be designated as the assessment district. The council received said report, and designated the described property as the property benefited, and to be assessed for said improvement, by a unanimous vote. At the same meeting a formal preamble and resolution was adopted by unanimous vote, upon call of the roll, fixing the assessment district, directing the assessor to assess the sum of "$8,544.97 on the property described, in proportion to the benefits and advantages which each description of said property is by him deemed to acquire from the making of said improvement, in the manner required by the charter of said city," and directing the city treasurer to collect from the railroad company the sum of $989.51. At a meeting held February 20, 1888, the clerk notified the council of the filing by the city assessor of the assessment roll, and the clerk was instructed to give notice of the hearing of appeals from said assessment for February 27, 1888, and notice was published by the said clerk as required by the charter. At a meeting of the

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council held February 27, 1888, complainants, with others, submitted to the council a protest against the confirmation of said assessment roll, alleging the following reasons:

"1. We deem the same illegal, unjust, inequitable, and against the rights of the undersigned, as the same was constructed against the wishes of said property-owners, and was not a necessary public improvement at the time the same was ordered to be paved, by reason of improper drainage, which has not been benefited by said improvement.

"2. Because the money expended in and upon said alleged improvement was excessive, and much in advance of the amount necessary to perform the work, and make such an improvement as the locality actually required."

The protest was referred to a committee, which reported March 5, upon which date the council affirmed the roll, by a vote of 15 ayes and 1 nay.

The proceedings of the common council show a strict compliance with all of the provisions of the charter. But the complainants insist that the tax assessed is illegal, for the following reasons:

"1. Because the said common council never declared the said improvement as made with tile drain to be a necessary public improvement.

"2. Because, after declaring the improvement of said avenue to be a necessary public improvement, the plans therefor and the improvement itself were changed in this, to wit, by putting tile drains under the curbs at great expense, and for which your orators are taxed in said roll without their consent and against their protest."

The common council had declared the improvement to be a necessary one, and had ordered it to be done, and this before plans and specifications therefor had been prepared, or an estimate was had of the cost of the work. Before the contract was let, indeed before bids had been advertised for, it was suggested to the council that sub-

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drains were necessary to drain the road-bed under the pavement, and prevent the freezing and heaving thereof in winter, and that such drainage would tend to prolong the life of the pavement materially; and the council, by unanimous vote, adopted the suggestion and ordered the tile drains. The declaration of the necessity for a public improvement does not necessarily involve the enumeration of the details of such improvement, but such declaration, although general in character, covers the doing of whatever is deemed or found to be necessary in the course of an improvement of the character designated.

"3. Because the board of public works let the contract for making said improvement without being thereunto duly authorized by the common council.

"4. Because said board of public works made said improvement without having authority so to do.

"5. Because the common council, after declaring the improvement of said avenue necessary, and ordering it improved, did by its action on the said 21st day of February, 1887, rescind and annul the same, and postpone the making of said improvement until such time as provision should be made for disposal of the surplus water, which provision has not yet been made."

The charter provides that whenever the common council shall have ordered a public improvement, and approved the plans and specifications therefor, the board of public works shall advertise for proposals for doing the said work. The common council had declared this work to be a necessary public improvement, had ordered it to be done, and had approved the plans and specifications therefor, and the board of public works had, in accordance with the provisions of the charter, advertised for proposals. Complainants contend that, by the action of the common council, had February 21, 1887, the improvement was practically abandoned. But the record affords no ground for this assumption. The council had simply determined that the letting of the contract "had better

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be deferred until such time as provision was made for the disposal of the surplus water." In the mean time, and on the 4th of April, at an election then held, a loan of $75,000 for the construction of the sewer had been authorized, and at the next meeting the council directed the board of public works to advertise for proposals. It is objected that the vote by which this direction was given was not recorded. The charter provides that—

"No public improvement shall be ordered, nor any tax or assessment shall be levied or confirmed, nor any work, services, or labor authorized to be done, or material purchased, nor any contract awarded or let, nor any money appropriated to be paid for, or out of, or by means of, any special assessment or tax, or from the city treasury, except by a concurring vote of nine members of the common council, including the vote of the recorder when presiding in the absence of the mayor. * * * *

"On all questions ordering any public improvement, levying or confirming any tax, approving any contract or bond, appropriating or expending any moneys, and on the final passage of any ordinance, the names of the members voting for or against the same, by yeas and nays, shall be entered upon the record of proceeding."

This resolution did not come within the terms of these charter provisions. This improvement had been ordered. A resolution directing the board of public works to advertise was not necessary, and its only office here was to inform the board of public works that the council had determined to proceed with the work; or, in other words, that the time for which the letting of the contract had been deferred had expired. The council had power to suspend, defer, or postpone the work at that stage, and the power to resume it as well. The exercise of either power was entirely within its discretion. It could postpone, for a reason sufficient to itself, and it could resume whenever, in its discretion, it saw fit so to do, and without reference to the reason which led to a postponement.

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"6. Because the common council, before declaring said improvement to be a public and necessary one, did not go upon the ground, nor visit the locality, nor take the other necessary and proper evidence to determine the fact so declared."

The record does not support these allegations.

"7. Because the common council did not inspect the street, nor the property in the vicinity thereof, nor take other proper evidence in relation thereto, before fixing the assessment district.

"8. Because said common council did not view said improvement, nor the property to be assessed, or take other proper evidence in relation thereto, before confirming and approving the special assessment roll.

"9. Because said common council delegated its authority in the premises to fix the assessment district to others.

"10. Because said common council did not make the assessment."

In matters involving the discretion or judgment of the common council, where no bad faith or fraud is alleged, parties cannot go behind the recorded vote to show either want of knowledge or of good judgment. Nor does the validity of the special assessment depend upon the fact as to whether or not the members of the council have viewed the property assessed, or the assessment district, with reference to that particular action. Aldermen are presumed to have a general knowledge of the geography, as well as the topography, of their own city, and to know the location and condition of its streets. They are supposed to act upon this general knowledge, and upon information furnished by committees, and by agencies whose duty it is to collect *data* and arrange details. Maps are prepared upon which each street and lot is described, and its boundaries shown. Profiles of street improvements are usually prepared, showing pre-existing grades, curb-lines, excavations, and summits. These are the evidences upon

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which the committees and council act. Nor does it affect the validity of an assessment that the assessor or city engineer furnished the information or *data* upon which the council acted, or that these officers actually outlined the district, provided the council adopted, approved, and confirmed their action. *Cuming v. Grand Rapids,* 46 Mich. 150, 158; *Baisch v. Grand Rapids,* 84 Id. 666. The charter makes it the duty of the assessor to spread the tax, and it is made the duty of the council to confirm it. The assessor performed his duty, and the council confirmed his action.

"11. Because said common council did not determine or declare that the whole or any part of the expenses of said improvement should be defrayed by an assessment on the owners or occupants of land to be benefited thereby, by an entry in their minutes or otherwise."

Section 6 of title 6 of the charter provides that—

"Whenever the common council shall determine that the whole or any part of the expenses of any public improvement shall be defrayed by an assessment on the owners or occupants of lands to be benefited thereby, they shall so declare by an entry in their minutes, and cause the said improvement to be made by and under the direction of the board of public works. * * * The common council shall, either before or after the completion of said public improvement, also declare, by resolution, whether the whole or what portion of the costs of such improvement shall be assessed to such owners or occupants, and set forth all lots, blocks, and parcels of real estate, or parts thereof, which, in their opinion, will be benefited thereby, and which shall be assessed therefor."

Section 7 provides that—

"The common council shall, upon the completion of any such public improvement, pass a resolution reciting the same, and the cost thereof, including the expense of making estimates, plans, surveys, assessments, and other expenses incident thereto, and may order the whole, or

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so much as they may deem proper, of such expense to be assessed upon the said lots, blocks, and parcels of real estate which, in their opinion, will be so benefited thereby."

By the resolution adopted October 10, as aforesaid, the council declared that, of the expense of said improvement, the sum of $8,544.97 should be assessed upon the owners or occupants of land to be benefited thereby, and that resolution was entered upon the minutes of the council. But it is claimed that this declaration should have been made before the work was commenced. If the first paragraph of section 6 of title 6 of the charter stood alone, there would be some foundation for this claim; but the next paragraph expressly provides that this declaration shall be made either before or after the completion of the work, and section 7 contemplates that it may be done after the completion of the improvement.

"12. Because there is nothing in the assessment roll, nor in any of the proceedings of the common council, nor the record and files of the common council, that shows that the tax assessed was limited to the special benefits conferred.

"13. Because there is nothing in the assessment roll, nor the proceedings of the common council, nor the records and files of said common council, that shows upon what basis or theory said assessment is made, whether by frontage, area, or value.

"14. Because the common council has never determined how much each or any of said parcels of land has been benefited (if at all) by said improvement.

"15. Because it does not appear from any of the proceedings to make said assessment, nor in the assessment itself, that the amounts assessed are no more than the value of the improvement."

The resolution of the council fixing the assessment district, and declaring that the sum of $8,544.97 should be assessed upon the property of that district, was a legal determination, under the charter, that the benefits conferred upon that district were equal to such amount, and

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the spreading of the aggregate amount upon the assessment roll, and the confirmation of that roll by the council, determined that the proportion of the aggregate benefit received by each parcel was equal to the burden imposed, and, in the absence of fraud, oppression, or manifest mistake, such determinations are conclusive. It does not appear by the assessment roll that the amounts assessed are no more than the value of the improvement, but that fact does appear in the estimate furnished by the city engineer, and in the preamble and resolutions fixing the assessment district, and directing the spreading of the aggregate amount upon that district, and repetition was unnecessary.

"16. Because the contract was let and improvement made as though no street-car line was laid and operated in said street, and no assessment against said street-car company was made on the basis of the benefits derived therefrom, leaving the amount assessed against your orators unequal, arbitrary, and inequitable."

The proceeeings recite that the amount assessed to the street-car company represented the cost of paving between that company's tracks, "pursuant to the provisions of section 3 of an ordinance" authorizing the location and maintenance of said company. The ordinance is not set out in the record, and it will be presumed that, by the terms thereof, the company was to be assessed with the cost of paving between its tracks, rather than upon the basis of benefits derived from the improvement.

It is unnecessary to consider the other objections made, as they are answered by a reference to plain provisions of the charter.

The decree of the court below is reversed, and complainants' bill dismissed, with costs of both courts.

The other Justices concurred.

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EUGENE TANGNEY, BY JOSEPH R. NOLAN, HIS NEXT FRIEND, v. J. B. WILSON & COMPANY (A CORPORATION).

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Master and servant—Negligence—Defective appliances.

Plaintiff, while pulling down an iron door, which was moved by means of a chain running over pulleys, and fastened to the top of the door, a weight being attached to the other end of the chain, was injured by its falling upon him. The chain broke, and on inspection it was found to have been connected together at one point with coils or strands of wire, which had broken or pulled apart. Plaintiff was unaware of the existence of this wire connection, and one of his fellow-servants, who had been in defendant's employ for eight years, testified to his want of such knowledge, and that he had never known of any repairs or inspection of the chain. And it is held that plaintiff made a sufficient showing to go to the jury, the case being ruled by *Weiden v. Electric Light Co.*, 73 Mich. 268; *Johnson v. Spear*, 76 Id. 139; *Van Dusen v. Letellier*, 78 Id. 492; *Morton v. Railroad Co.*, 81 Id. 423.

Error to Wayne. (Gartner, J.) Submitted on briefs June 20, 1891. Decided July 28, 1891.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Sloman, Berry & Duffie (*C. E. Warner*, of counsel), for appellant.

Wisner, Speed & Harvey (*F. C. Harvey*, of counsel), for defendant, contended:

1. Negligence cannot be presumed, but, when relied upon as a cause of action, it must be affirmatively proved in the manner pleaded; citing *Mitchell v. Railway Co.*, 51 Mich. 236; *Alpern v. Churchill*, 53 Id. 607; *Mynning v. Railroad Co.*, 59 Id. 257, 67 Id. 677; nor can it be inferred from mere conjecture; citing *Hewitt v. Railroad Co.*, 67 Mich. 61.

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2. If the knowledge or ignorance of a master and servant of defective apparatus is the same, the servant cannot recover. Each is bound to exercise ordinary care; citing *Railroad Co. v. Austin*, 40 Mich. 247; *Batterson v. Railway Co.*, 49 Id. 184; *Balle v. Leather Co.*, 73 Id. 158.

MORSE, J. This is an action for personal injuries. The court below directed a verdict for the defendant on the ground that no negligence on its part had been shown. There was no testimony given on behalf of the defendant, and the case rested upon the showing on the part of the plaintiff.

At the time of the injury plaintiff was 20 years of age, and had been in the employ of the defendant about five months. His duties consisted in making cores in a foundry for iron castings, placing them on a carriage, pushing the carriage into the drying oven or furnace, lighting the fires, and adjusting an iron door in front of the furnace. The door was made of sheet-iron over an iron frame-work, and was 10 feet high by 6 or 7 feet in width, and weighed between 250 and 300 pounds. It was moved up and down over the entrance to the furnace by means of a chain fastened to its top, and running up over a trolley-wheel or fixed pulley, across to another wheel about four feet distant, and from thence down the wall of the foundry nearly to the ground. To this end of the chain a weight was attached, which counter-balanced the weight of the door. It will be seen that when the door was up there was a constant strain on the chain at least equal to the weight of the door. The door, when up, was higher than a person's head. There was a rim on the inside of the door, or the frame, which was taken hold of by the hands to pull it down. It took two persons to do this.

As plaintiff and another employé, on the 28th of January, 1890, were pulling this door down, the chain

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broke, and the door fell upon plaintiff, breaking his leg and otherwise injuring him. The chain was covered with grease and soot, so that its condition when in place was not well open to observation. The chain was of wrought iron, and the links were about two inches in length, and from a quarter to five-sixteenths of an inch in thickness. It was found after the accident that this chain had been connected together in one place with coils or strands of wire, which had broken or pulled apart. The wire was rusty, and had evidently been there a long time. The fact of this wire connection was unknown to plaintiff; and James Hurley, who had worked in the foundry since 1882, testified that he did not know there was any wire there until it broke. He had never known of any repairs to the chain while he was there, or of any inspection of it by any one. The witnesses could not tell definitely what the dimensions of the wire were, but it was shown to be from one-sixteenth to one-eighth of an inch in thickness; nor was it shown definitely how it was arranged,—how many strands there were in the coil, or whether it was twisted together or not. The fact was apparent, however, that the wire had become in some manner, probably from rust, so weakened that it could not stand the strain, and broke or parted. It was not shown with any certainty whether more than one strand of the wire was broken. One witness thought they were all broken, and that there were four or five strands in all, but there might have been a dozen.

I think the plaintiff made a sufficient showing to go to the jury, and that the case is ruled by the following cases in this Court: *Van Dusen v. Letellier*, 78 Mich. 492; *Johnson v. Spear*, 76 Id. 139; *Morton v. Railroad Co.*, 81 Id. 423; *Weiden v. Electric Light Co.*, 73 Id. 268.

It was the duty of defendant to provide a safe place for plaintiff's work, and to furnish safe and suitable

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appliances to be used in and about his work. And its duty did not end here. It was also its duty to see that the appliances so furnished should be kept safe, so far as reasonable and proper watchfulness and inspection would enable it to do so. It was the duty of defendant to guard against the dangers liable to arise from the almost constant strain upon this chain, and the wear and tear of its moving. It is certainly shown by the testimony that the use of this wire weakened the strength of this chain, and therefore imposed upon the defendant more than ordinary watchfulness and care. The evidence tended to show that it had been in this condition for eight years without change or inspection. This chain must have been joined by this wire connection either by the defendant, or with its knowledge and consent, or it was negligent in its examination of it. If joined by the defendant, its duty was to examine it frequently, to note its condition. It may be that the defendant can explain the condition of this wire, so as to rebut any presumption of negligence arising from the facts shown by plaintiff; but until it does so the plaintiff, in my opinion, has made a case for recovery.

The judgment is reversed, and a new trial ordered, with costs of this Court to plaintiff.

The other Justices concurred.

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THE AUDITOR GENERAL v. WILLIAM McARTHUR AND ARCHIBALD McARTHUR, WILSON H. TOUSEY AND JOSEPH TURNER, AND JAMES T. HURST.

[Three cases.]

Taxes—Validity—Burden of proof—Certification to board of supervisors—Record of township board.

1. Where a tax is directed to be raised by the board of supervisors under section 24 of the tax law of 1885, which is not certified to the board by the township clerk pursuant to the provisions of said act, the burden is upon the tax-payer to show that such tax was not originally authorized to be raised by competent authority; citing *Robbins v. Barron*, 33 Mich. 124; *Upton v. Kennedy*, 36 Id. 215; *Boyce v. Sebring*, 66 Id. 218.
2. The record of the proceedings of a township board at a special meeting showed that only one justice was present, and failed to show that notice was given to the other justice. It appeared that $1,000 was voted to be raised for township expenses, $1,000 as a special tax for bridge purposes, and $1,000 to pay indebtedness, but the record failed to show the neglect or refusal of the electors to vote taxes for such purposes. And it is held that the taxes are invalid under the decisions in *Beaver Creek v. Hastings*, 52 Mich. 528; *Harding v. Bader*, 75 Id. 316; *Gamble v. Auditor General*, 78 Id. 302; *Manufacturing Co. v. Echtinaw*, 81 Id. 416.
3. The exemption of four surveyed townships in a school-district from a general school tax levied upon the remaining territory is fatal to the validity of the tax levy, the law under which the district was organized requiring that all taxes should be spread upon all of the taxable property of the district.

Appeal from Presque Isle. (Kelley, J.) Argued June 19, 1891. Decided July 28, 1891.

Petition for sale of lands delinquent for taxes under Act No. 195, Laws of 1889. Defendants appeal. Decree

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modified and affirmed. The facts are stated in the opinion.

Philip A. Ingalsby, for petitioner.

Markey & Hall, for appellants.

CHAMPLIN, C. J. These three cases are heard as one case.

The defendants are owners of land situated in the townships of Allis, Case, Rogers, Belknap, and Metz, in the county of Presque Isle, assessed for the taxes of the year 1888. These taxes were not paid, and the lands were returned as delinquent therefor; and, in answer to the petition of the Auditor General for the sale, filed in the circuit court for said county, defendants appeared, and filed written objections to the validity of the taxes. On the 4th day of April defendants paid to the county treasurer of said county all taxes decreed valid, and appealed to this Court.

The only questions involved are as to the legality of the following taxes, amounting to $1,169.58: Contingent and highway taxes in all of the townships; school taxes in Case, Allis, Belknap, and Metz townships; Union School tax in Rogers township; and poor tax in Belknap township. The defendants insist that the supervisors of the several townships had no authority under the law to spread any of the various taxes on these rolls.

The township clerks of the various townships, under section 23, Act No. 153, Laws of 1885, on or before the first day of October in each year, are required to deliver to the supervisor of each township a certified copy of all statements and certificates on file, and of all records of any vote or resolution, in his office, authorizing or directing moneys to be raised in his township for township, school, highway, and all other purposes, together with a

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statement of the aggregate amount thereof, and the supervisors are to lay these copies before the board of supervisors at the October session. The board of supervisors is required by section 24 of the same act then to examine all these certificates, statements, papers, and records so submitted to them, and, if it shall appear that any of these certificates, papers, statements, and records is not properly certified, or that the same is in any wise defective, or that any proceedings to authorize the raising of any such money has not been had, or is in any wise imperfect, and such certificate, statement, paper, record, or proceeding can then be corrected, supplied, or had, the board may authorize it to be done. The prosecuting attorney is required to give a written opinion to the board as to those certificates, proceedings, etc., being sufficiently regular to warrant and justify the raising of the taxes contained therein. The board shall direct that such of the several amounts of money proposed to be raised for the purposes named, as shall be authorized by law, be spread on the assessment roll of the proper township.

This was all done in the county in question, and, at the October session of the board in the year 1888, the certificates from the various township clerks were laid before it, as follows:

"EXHIBIT A.

"OFFICE OF THE TOWNSHIP CLERK,
"Allis Township, October, 1888.

"*To the Supervisor of the Township of Allis, County of Presque Isle, State of Michigan:*

"I hereby certify that the annexed are true copies of all statements and certificates on file and of record of votes and resolutions in my office, authorizing and directing moneys to be raised in the township of Allis by taxation for township, school, highway, drain, and all other purposes, and that the aggregate amount of said money is as follows:

[Signed] "JAMES SANDISON,
"Town-Clerk.

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"Township tax, one-half of one per cent.; highway tax, one per cent., one-half labor and one-half cash; school-district No. 1, $347; No. 2, $260; No. 3, $270; No. 4, $300; No. 5, $404."

"EXHIBIT B.

"OFFICE OF THE TOWNSHIP CLERK,
"Metz Township, October 8, 1888.

"*To the Supervisor of the Township of Metz, County of Presque Isle, Michigan:*

"I hereby certify that the annexed are true copies of all statements and certificates on file, and of all other record of votes and resolutions, in my office, authorizing or directing money to be raised in the township of Metz by taxation for township, school, highway, drain, and all other purposes, and the aggregate amount of said money is as follows:

"WATSON D. CENTALE,
"Township Clerk.

"Town tax, $1,000; special, one-half of one per cent.; town tax for indebtedness, $890.94; school-district No. 1, 5 mills, being $57.56; No 2, 15 mills, being $135.69."

"EXHIBIT C.

"I do hereby certify that the following is a true and correct copy of all statements on file or of record in my office to be raised therein by taxation for all purposes, and that the aggregate amount thereof is the sum of ——— dollars: Contingent fund, $600; highway fund, $519.63; special highway, $311.73; school-district No. 1, $275; school-district No. 2, $270; school-district No. 3, $283.10; No. 4, $400; No. 5, $375.

"In testimony whereof I have hereunto set my hand this ——— day of September, 1888.

"LOUIS GODIN,
"Town-Clerk, Case Township."

"EXHIBIT D.

"*To the Supervisor of the Township of Belknap:*

"I do hereby certify that the following is a true and correct copy of all statements on file or of record in my office of moneys proposed to be raised therein by taxation for all purposes, and that the aggregate amount thereof is hereunder:

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"By highway tax, one per cent.; by town highway tax, 5 mills; for town poor purposes, two and one-half mill; for school purposes, district No. 1, 8 mills; No. 2, 10 mills; No. 3, 12 mills; No. 4, 15 mills; No. 5, 15 mills.

"In testimony whereof I have hereunto set my hand and seal this 6th day of October, 1888.

"CHRISTIAN BREGE,
"Township Clerk."

No other evidence was laid before the board showing the authority to order the levy and assessment of said taxes, and no proofs relating thereto or in support thereof were submitted on the hearing of the cause other than that contained in said certificates, except as to the taxes of the township of Rogers.

The assessment roll is by the statute made *prima facie* evidence of the legality of the taxes contained in it. The counsel for defendant insist that, under section 89, the burden is thrown upon the petitioner, viz., the Auditor General, to establish in some form the legality of a tax not authorized or warranted by the certificates, statements, records, and papers filed with the board of supervisors; that the only evidence justifying the contingent and highway taxes in all of said townships, the school tax in Case, Allis, Belknap, and Metz, and the poor tax in Belknap, is contained in Exhibits A, B, C, and D, and that these contain no showing sufficient to warrant the board of supervisors in ordering a levy, or the individual supervisors in assessing any of such taxes; that these exhibits do not show whether the electors voted such taxes at the annual township meetings or at a special meeting, or whether they voted them at all; that they may have been voted by the township board, but that no evidence is contained therein which would guide the board in determining whether all the members of the township board were present, or but a part of

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them, or whether it was a regular or a special meeting thereof; that, for all that appears therein, these taxes, if ever directed by any one, may have been by private individuals not vested by law with the authority to impose a burden upon their neighbors' property and their own, and denominate it a "tax;" that the presumption of the legality of the taxes being overcome by introducing the certificates, and showing their insufficiency, they must fall, as no proof is offered by the Auditor General giving jurisdiction to impose them; that he must assume the burden which the law throws upon him; that every essential proceeding in the levy of taxes must appear of record; citing *Moser v. White*, 29 Mich. 59; *Sinclair v. Learned*, 51 Id. 335; *Case v. Dean*, 16 Id. 12; *Peninsular Iron Co. v. Township of Crystal Falls*, 60 Id. 510; *Sage v. Auditor General*, 72 Id. 638; *Gamble v. Auditor General*, 78 Id. 302.

We think it clear that the board of supervisors cannot certify the taxes to be raised in any township without the certificate of the township clerk, but, if the supervisor levies a tax not appearing in the certificate to the supervisors, it must be shown that such tax was not voted by the proper authorities, or, in other words, that the tax was unauthorized. If it was authorized by competent authority in the first instance, the want of a certificate by the township clerk to the board of supervisors will not invalidate a tax duly directed to be raised by the board, as required by section 24, Act No. 153, Laws of 1885. The certificates are *prima facie* sufficient, and, if irregular, we do not think the statute intended to shift the burden of proof to the township to show that such taxes were voted by competent authority, but the person against whom the tax is assessed has the burden of showing that no such tax or item as stated in the certificate was authorized. It does not appear upon the face of

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these certificates that the tax therein contained was for an illegal purpose, or for an illegal sum, and the board of supervisors was justified in regarding them as a sufficient statement, without requiring the clerk to certify when and by whom the taxes were voted. We held in *Robbins v. Barron*, 33 Mich. 124, that a tax which was authorized to be spread upon the roll by law, if so spread by the supervisor, was not illegal, although the same had not been certified to the board of supervisors, and by them directed to be levied. This was approved in *Upton v. Kennedy*, 36 Mich. 215, and reaffirmed in *Boyce v. Sebring*, 66 Mich. 218. It is true that the act of 1885 amplifies the law as it existed when *Robbins v. Barron* was decided, but the purpose is the same. The object of the statute is to guard, as far as possible, against the imposition of illegal taxes, and the consequent embarrassment to the collection of the taxes levied; but it does not prevent the levying of legal taxes, and the spreading thereof upon the rolls. The assessment roll is *prima facie* evidence of the legality of the taxes contained in it, thus casting upon those who contest its validity the burden of showing wherein such tax is illegal. The decree of the circuit court is correct, so far as the taxes referred to in the certificates are concerned.

The township tax of the township of Rogers, the special tax for bridge purposes, and the special tax to defray indebtedness, each ror $1,000, stand upon a different footing. The proceedings of the township board of the last named township, as contained in the record kept by the clerk, were offered in evidence by defendants, and are as follows:

"Meeting of the township board held at the township clerk's office, the first day of October, 1888.

"Paul Bittner, supervisor; William E. Rice, township clerk; and Justice James B. Watson.

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"Meeting called to order by the chairman, and the board proceeded to settle with the township treasurer for the year 1888, with satisfactory results. Minutes of last meeting read and approved.

"Motion made and carried that the township of Rogers raise $1,000 for the year 1888, to defray township expenses, to be assessed on the tax roll of 1888. Motion made and carried that the township of Rogers raise $1,000 special tax for bridge purposes, to be assessed on the supervisor's roll for 1888. Motion made and carried that the township raise $1,000 special tax to defray indebtedness, to be assessed on the tax roll of 1888."

These taxes are illegal under our previous decisions. *Township of Beaver Creek v. Hastings*, 52 Mich. 528; *Harding v. Bader*, 75 Id. 316; *Gamble v. Auditor General*, 78 Id. 302; *Newaygo Co. Manfg. Co. v. Echtinaw*, 81 Id. 416.

The Union School tax of the township of Rogers is the only one not disposed of, and, as to this, it was void, for the reason that it was spread over but part of the territory comprised within the limits of the district. This district was organized by Act No. 408 of the Local Acts of 1871, and amended by Act No. 387 of the Local Acts of 1885. Section 1 of the amended act reads as follows:

"That township thirty-four north, of ranges four, five, and six east, and township thirty-five north, of ranges four and five east, and township thirty-six north, of ranges two, three, four, and five east, and township thirty-seven north, of range two east, which are now embraced in the limits of what is known as the 'Township of Rogers,' in the county of Presque Isle, constitute one school-district, which shall be a body corporate by the name and style of the "Union School-district of the township of Rogers," and by that name may sue and be sued, and shall be subject to all the general laws of this State relative to corporations, so far as the same may be applicable," etc.

The records of the proceedings of the board of trus-

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tees of the Union School-district were offered in evidence, at a meeting held on the 28th day of July, 1888, which read as follows:

"Meeting called to order by the president, and a full board found to be present. The following resolution was adopted:

"*Resolved,* that this board think it advisable and do hereby advise the annual school meeting to raise one per cent. of the assessed valuation of said district for school purposes, and one-half of the same to be spread for teachers' wages, and one-half of one per cent. for repairing."

The record of the annual meeting of the school electors of said district on August 6, 1888, was offered in evidence, and reads as follows:

"A motion was made by D. E. Gunn, and was duly seconded, that the district raise $500 for the purpose of building a suitable addition to the Rogers City schoolhouse. Motion was carried by a clear vote. Motion made and carried that the district raise one per cent. of the assessed valuation for school purposes, one-half of said one per cent. to be a special tax for teachers' wages."

This tax was not assessed upon all the property in the Union School-district, none of said tax being spread upon any of the following territory within said district: Townships 35 N., range 4 E.; 34 N., range 4 E.; 34 N., range 6 E.; and 35 N., range 5 E. The law organizing the Union School-district requires all taxes to be spread upon all the taxable property in the district, and why such a large portion was omitted, including the township in which Rogers City is located, is not shown by this record. The whole act organizing this school-district is a remarkable specimen of legislation, to say the least, and the attempt of the supervisors to lay these taxes upon the least improved part of the district is more remarkable. The imposition of a tax which omits from the roll four

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surveyed townships in one school-district cannot be upheld.

The decree of the court below must be modified in accordance with this opinion, and, as modified, affirmed. The defendants having only partially succeeded on this appeal, no costs will be awarded to either party.

The other Justices concurred.

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In the Matter of William Walsh on Habeas Corpus.

State prison—Misconduct of convict—Forfeiture of good time.

1. How. Stat. §§ 9703, 9704, governing debits and credits for good conduct or misconduct of convicts in the State prison, are held to contemplate:

   a—That the rules in reference to the forfeiture of good time shall be plain, certain, and specific, and known to the inmates of the prison, and be adopted by the board of inspectors, and be of record.

   b—That each convict's record as to loss of good time, and for what reason he has lost it, shall be made known to him monthly.

   c—That the reports of the infractions of the rules shall be investigated each month at the regular meeting of the inspectors, and passed upon by them, and that a record shall be made of their action, so that the amount of lost time to be deducted from a convict's good time shall not rest upon any computation of the warden's clerk, but may be shown at once from the inspector's records; and the convict who is reported by the officers should be given, if he desires, an opportunity to be heard upon such reports.

Habeas corpus. Submitted June 30, 1891. Prisoner remanded June 30, 1891, and opinion filed July 28, 1891.

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Charles A. Blair, for petitioner.
A. A. Ellis, Attorney General, for the people.

MORSE, J. William Walsh, who was confined in the State prison at Jackson, applied by his counsel, Charles A. Blair, to this Court, June 29, 1891, for the writ of *habeas corpus*. The writ was granted, and a hearing had upon the petition and return of the warden on June 30, 1891, when he was remanded back into the custody of the warden of said State prison, with the intimation that his time of imprisonment would expire July 12, 1891, at noon, if nothing growing out of his own conduct intervened before that time. It appears that Walsh was sentenced to such prison, October 3, 1885, for the term of seven years, and it is conceded that, if had not lost any of the good time given to him by the statutes of this State, his term would have expired March 21, 1891. But it was claimed by the warden that, by reason of infractions of the prison rules, his good time had been so reduced that his term would not expire for some time. The statutes provide as follows:

"SEC. 9703. The board of inspectors may establish a proper scale or rate of debits and credits for good conduct or misconduct, which shall be a part of the rules of discipline of the prison, and in a book to be kept for that purpose may cause to be entered up, at the end of each month, the total of credits to which each prisoner may be entitled; and they shall require the warden, on the first day of each month, by means of cards or otherwise, to announce such result to each prisoner.

"SEC. 9704. The warden shall keep a record of each and all infractions of rules of discipline by convicts, with the names of the persons offending, and the date and character of each offense, which record shall be placed before the managers at each regular meeting of the board; and every inmate who shall have no infraction of the rules of the prison or laws of the State recorded against him shall be entitled to a deduction for each year of his sentence, and *pro rata* for each part of a year, when the

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sentence is for more or less than one year, as follows: From and including the first year, up to the third year, a deduction of two months for each year; from and including the third year, up to the fifth, a reduction of 75 days for each year; from and including the fifth up to the seventh year, a deduction of three months for each year; from and including the seventh year, up to the tenth year, a deduction of 105 days for each year; from and including the tenth year, up to the fifteenth year, a deduction of four months for each year; from and including the fifteenth year, up to the twentieth year, a deduction of five months for each year; from and including the twentieth year, up to the period fixed for the expiration of the sentence, six months for each year. The inspectors shall provide by rule how much of the good time thus earned a convict shall forfeit for one or more violations of the prison rules. The warden, in computing the diminution of time for those now in the prison, shall allow them for the good time made up to the time this act takes effect, in accordance with the provisions of law previously in force, and thereafter it shall be computed in accordance with the terms of this section. Whenever a convict has been committed under several convictions, with separate sentences, they shall be construed as one continuous sentence in the granting or forfeiting good time."

This section, as it now stands, was enacted in 1877. This practice of permitting the convicts to earn good time by good conduct has been incorporated in our statutes since 1857. Its apparent object is to stimulate the prisoners to good behavior by the hope of reward in the shortening of their terms of confinement. To obtain this end, it is wisely provided that the convict shall know what the rules of prison discipline are; what the penalty of his infraction of any rules will be; and that he shall be acquainted at the end of each month with his standing as to good time. It will also be noticed that he earns the good time provided for in the statute, unless the board of managers forfeit the whole or a part of it for breaches of the discipline of the prison. And

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it is evidently intended that such forfeiture shall not rest in the caprice or favoritism of the board in each particular case, but shall depend upon fixed and regular rules, applying to all alike, which shall be adopted by the board, and promulgated so as to be known and understood by the prisoners. The practice at the State prison at Jackson has not been in conformity with the spirit or letter of the statute.

The application of William Walsh for the writ of *habeas corpus* was first made to Hon. Erastus Peck, circuit judge of the circuit court for the county of Jackson, who, upon the hearing of the writ, refused to release the petitioner, and advised, because of the importance of the questions raised, that he apply to this Court for the writ. By agreement, and to expedite the hearing before us, a copy of the testimony taken before Judge Peck was presented to this Court. The facts in Walsh's case show that April 7, 1885, the board of inspectors of the prison adopted the following rules:

"Rule 1. Any convict who shall violate the rules of the prison shall lose a portion of good time for each offense; and, if two or more offenses shall be committed in one month, he shall lose time for each offense, the same as though they were committed in different months.

"Rule 2. Any convict who shall assault a keeper with intent to do him serious bodily harm shall, in the discretion of the board of inspectors, forfeit all the good time that he may have earned up to the date of his offense.

"Rule 3. Any convict who shall escape from the prison, or attempt or conspire with others to escape, or shall be found with tools or weapons to be used in escaping or attacking officers, shall, in the discretion of the board of inspectors, forfeit all the good time earned up to the date of the offense."

These are all the rules to be found on the subject adopted by the inspectors, and now in force in said prison. There is not any written rules stating what the forfeiture

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will be for any infraction of the rules, excepting for assault of a keeper with intent to do serious bodily harm, escaping or attempting to escape from the prison, or having tools or weapons in possession for the purpose of use in escape or assault, and these rest in the discretion of the inspectors. There is no written certain standard of the number of days that will be lost from the good time by the infraction of any rule of the prison, as was evidently intended by the statute. But a practice has grown up in the prison of taking for each offense, however trivial or heinous, the same number of days from the convict's good time, to wit, as many days as he would earn in a month if he lost no good time, by an obedience to the rules. When this practice originated, or who authorized it, is not definitely shown by the testimony, but it has existed for a long time, and the present warden and officers have followed it since their incumbency, commencing in January of this year.

The manner of keeping the record of the infractions, and the consequent forfeitures, is as follows: In a book, called the "Warden's Daily Journal," there is entered the reports of the keepers and other officers of the prison of infractions of the rules by the various convicts. The reports are made by these officers to the warden, and filed by him, and the substance of such reports entered by his clerk in the journal. Sometimes the entries are not made of the same date as the report, or in consecutive order, which fact occasioned some trouble in determining the exact *status* of Walsh's forfeitures in the present case. When the inspectors meet, their action seems to consist in approving the reports, by signing their names in the journal. It does not appear that the prisoners are notified each month, if at all, of their standing as to lost time or good time, except the clerk testifies that, if they ask for it, "we will figure up his time, and show him

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when his good time expires, counting the reports that are against him." This is done by the warden's clerk, and the computations are not presented to the board of inspectors, nor are the computations made monthly, as they should be. Under this loose system, the board of inspectors know but little, if anything, of any man's standing as to lost time or forfeitures, and the computations of the clerk are not infallible, as was shown in the present case. It would seem that the keepers and the warden's clerk are really the persons who, under the practice grown up in this prison, fix the forfeitures of the convicts of their good time. The keeper reports an infraction of the rule, and the clerk files it away, and enters the substance of it in the daily journal, as, for instance:

"Nov. 17, 1890. Number 3,628. (Walsh.) Reported by Keeper Skinner for talking to men locking near him in the east end."

When the clerk of the prison, Charles F. Knapp, was sworn in the proceedings before Judge Peck, he had a card upon which the lost time of Walsh had been computed by the warden's clerk, showing two reports the first two years, 5 days each; one the third year, 6 days; five the fifth year, 7½ days each; and eight the sixth year, 7½ days each; in all 113½ days. Knapp was unable to find three of the reports entered on the daily journal, and concluded that, under the practice of the prison, they ought not to be charged against the prisoner, because they had not been approved by the signatures of the prison inspectors in the journal; but, on examination of the journal by this Court, we found the entries, but under other dates. The book showed that January 15, 1891, there was a report entered in the journal against Walsh and three others for attempting to escape from

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the prison. At the time of the hearing before Judge Peck, the board of inspectors had not passed upon this attempt to escape, except by signing the journal as before stated, in which the fact of the report being made was entered; but under the practice in vogue he lost no more good time than he did for "making a pipe in his cell," or talking with another convict without permission; and in the computation of the clerk, presented to us, and made out in conformity with this custom, he is charged with 7½ days of lost time, it being in the sixth year of his confinement, and 7½ days being the amount of good time he would earn each month that year under the law. But after the hearing before the Jackson circuit judge, and before the application to this Court, two of the three inspectors of the prison met at a special meeting, June 22, 1891,—how called, it does not appear, or whether the other member of the board had notice of it,—and passed a resolution forfeiting all the good time earned by Walsh up to January 15, 1891, because of his attempted escape at that date.

Considering that this irregular practice of forfeiting good time had existed in the State prison, as shown by the testimony, for at least 20 years, we are inclined to hold it, as far as those now confined in the prison are concerned, of the same efficacy as a written rule; and for each infraction of a prison rule, no matter what its import, whether a trivial or serious breach of discipline, the board of inspectors, the governing power of the prison, have ordained that the prisoner shall lose as many days of his good time as he would be earning under the law each month in the year of such infraction. This would deduct from Walsh's good time 113½ days, and release him from confinement on the 12th day of July, 1891, at noon, as we intimated in our oral decision.

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The action of the two members of the board must be treated as of no force or effect. We have held this unwritten rule or custom binding on the prisoners, and it must also be held binding upon the board of inspectors, until new rules are adopted, at a regular meeting of such board, and promulgated to the inmates of the prison. It is held valid because it has existed so long that it must be presumed to be known and understood by all within the prison walls. Under this unwritten rule, or rather custom, Walsh has had his lost time for attempting to escape once fixed and deducted from his good time. This custom cannot be thus set aside in his particular case. It would look, without explanation, as if this action were taken in view of Walsh's application for this writ, as nearly six months had elapsed from the commission of the offense before any action was taken, other than the observance of the usual custom in such cases.

We are led by the facts in this case to suggest to the managers of this prison the speedy abolishment of this custom, which has no foundation in the law, nor any equity or justice in it, and which is in evident conflict with the plain purposes of the statute. The law clearly contemplates—

1. That the rules in reference to the forfeiture of good time shall be plain, certain, and specific, and known to the inmates of the prison.
2. That they shall be adopted by the board of inspectors, and be of record.
3. That each convict's record as to loss of good time, and for what reason he has lost it, shall be made known to him monthly.
4. That the reports of the infractions of the rules shall be investigated each month at the regular meeting of the inspectors, and passed upon by them, and that a record shall be made of such action, so that the amount of lost time to be deducted from a convict's good time shall not rest upon the computation of the warden's

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clerk, but may be shown at once from the inspectors' records. In justice, also, to the convict who is reported by the officers, who are human, and liable to err, he should be given, if he desires, an opportunity to be heard upon such reports.

Under the statutes, the warden is required "to read to the convicts, at least once in each month, the rules and regulations of the prison, so far as the same relate to such convicts." How. Stat. § 9686, subdiv. 8. These rules and regulations must be hung up in each cell in a conspicuous place, and they must be printed or written in a language known to the convict occupying the cell. Id. § 9680.

If the law is properly complied with, there will be no occasion for any *habeas corpus* proceedings to determine when a convict shall be released on account of his good time. Each prisoner will know and understand just what each infraction of the rules will cost him in forfeiture of such good time. If he is reported, he may have a hearing before the governing board of the prison. They will investigate and pass upon the reports against him, and their determination will be a matter of record; and, at the end of each month, he will be made acquainted with his exact standing as to loss of good time, about which there can be no mistake or dispute. If this had been done in the present case, there would have been, in all probability, no case here before us, or, if there had been, there would have been no difficulty in at once determining from the records the exact day that Walsh was entitled to deliverance. As it is, it was quite uncertain, until this Court laboriously examined the warden's journal, just how many days of his good time Walsh had lost under the custom in vogue at the prison.

It also appears from the record that, when the counsel for Walsh first applied to ascertain his standing as to

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good time, the warden's clerk furnished him with a card, which showed his total lost time to be ten months and twenty days, and in which he was charged, "Dec. 9, /90, att. escape,—7—30" the "7—30" being figured in the total as 7 months and 30 days. When the present clerk of the prison, Mr. Knapp, testifies on the hearing before Judge Peck, he brings in the other card, which shows the lost time to be only 113½ days; and he says that the first card was filled out by Mr. Avery, the clerk who preceded him, and that it is a mere memorandum, and not correct. Such loose practice as this puts the convict, without resort to the courts, as far as his good time is concerned, at the mercy of the mistakes of clerks, whose business under the law is not to compute the lost time of the prisoners upon some custom or usage, but to record the acts of the board of inspectors, and to obtain the standing of the convicts as to good time from the records of such board. Most manifestly the board of inspectors have not performed their duties in this respect under the law. Their failure to do so has made business for the courts and expense to the State, and is an injustice to those confined in the prison, who, although convicts, are yet entitled to the rights which the law plainly and expressly gives them as such convicts.

The other Justices concurred.

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TRUMAN E. STEVENS v. GEORGE E. PANTLIND AND JOHN A. B. MEADE.

Landlord and tenant—Surrender of premises—Directing verdict.

The court is held to have erred in finding as matter of law, upon plaintiff's testimony, that the defendants had surrendered possession of a mill leased of the plaintiff prior to its destruction by fire, and that its care had been assumed by the plaintiff; plaintiff not having rested his case, and not claiming to be entitled to recover upon the case then presented, and having advanced no theory inconsistent with the case set forth in his declaration.

Error to Osceola. (Judkins, J.) Argued July 1 and 2, 1891. Decided July 28, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Charles A. Withey (*C. H. Rose,* of counsel), for appellant.

Blair, Kingsley & Kleinhans, for defendants.

MCGRATH, J. On the 14th day of May, 1888, plaintiff leased to defendants—

"His entire saw-mill, together with all tools and supplies on hand, also his team of horses, one set of trucks, one wagon, and use of barn now occupied by him, for so long a time as it shall take said second parties [defendants] to cut what logs they have in the first party's mill-yard, and lots adjoining; together with the right of ingress and egress, along and upon all and every part of said premises, for the purpose of doing said work. Said first party also agrees to work in the mill under direction

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of second parties, or their agent, at the rate of two dollars per day, so long as his work shall prove satisfactory to said second parties, but no longer."

In consideration of said lease and agreement, defendants agreed to pay plaintiff the sum of $500, and also to pay him at the rate of $2 per day for all the time that he should work in said mill. The lease contained these further provisions:

"The parties of the second part further agree that, as soon as the job is completed, they will return the above property, with the exception of the supplies, in as good order and condition as it was when they received it, excepting natural wear and tear and damage by fire or the elements.

"It is further agreed that, should the mill be destroyed by fire, this lease and contract shall terminate and become void. The parties of the second part agree to keep a night watchman, and exercise due care and diligence to protect said property from fire, the same as though the property was their own."

Defendants operated the mill under this lease from May 14 until July 11, 1888, during all of which time plaintiff was employed as sawyer and filer in the mill, and lived upon the same premises within about 300 feet of the mill. It appears that when defendants took possession there were no accumulations of sawdust or slabs about the mill; that a box had been constructed on the south side of the mill to collect the surplus rubbish, and was so arranged that a wagon could be backed under the box to draw the surplus away, as plaintiff did when he ran the mill; that after defendants took possession the box was torn down in some way, and from that day on they allowed the sawdust to accumulate in great quantities around the mill, and threw the ashes from under the grate into the sawdust; that in the latter part of June a

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fire had occurred in the mill; that the plaintiff had called the superintendent's attention to the danger of allowing the sawdust and slabs to accumulate, and he had promised to draw them away; that fire would smoulder in a pile of sawdust for weeks, and perhaps months; that the mill was shut down from June 30 to July 9; that before the mill was shut down plaintiff asked the superintendent if he intended keeping a watchman there while the mill was shut down, and he said it was not necessary, whereupon plaintiff told him it was dangerous to have the property in that condition, and plaintiff said, "Under the terms of the lease, the company is good if the thing burns down;" that on July 11 defendants got through cutting logs, laid off their men, and paid plaintiff for his labor, but the balance of the rent was not paid until July 23; that the sawdust and slabs had accumulated in great quantities around the mill. Plaintiff testified as follows:

"Mr. White did the paying. He came down to the mill on July 11, and we went down into the engine-room and around on the south-west side of the end of the mill, the corner of the fire-room, and got to speaking about the sawdust there, and the rubbish; and he asked me what I would take to call the mill in as good condition as it was when they received it; and I told him that I would take $50, and Mr. White said, 'That is too much.' 'Very well,' I said, 'I don't care for the job at all; all that I ask of you is to put the mill in as good condition as when you received it; as far as sawdust and rubbish and everything of that sort is concerned.' * * * I says to Mr. White, 'I supposed you were left here to settle up with me, and turn this property over.' He says: 'I have nothing to do with it. I have no right to do it. Mr. Watson intended to be here to-day, but he was sick, but he will be here in a day or two, and he will fix the matter up, and turn the property over to you in good shape.' In the mean time he expected some local parties there to draw away some of the edgings and slabs that

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was left there. He said they wanted them for wood. * * * He spoke about the team. He wanted I should take the team. He said they were out of feed, and had no hay, and it would be an unnecessary expense for them to go and buy hay, as they had nothing to do for it. He said Mr. Watson would be up in a day or two, and he wanted me to take the team and take care of it, and I said, 'I don't want to accept the team so it will in any way hold me in accordance with that lease, as accepting the mill back or anything of that sort.' He said that wouldn't make any difference; that would be all right; there wouldn't be any trouble about that, anyway. Mr. Watson would be up in a day or two, and everything would be settled up satisfactory. * * * The next morning, July 12, I had a conversation with him at the hotel. There was an unsettled account about some wood that they had burned up, that I had forgotten. He said he would have it arranged, and I would get it when they sent me the amount due me on the mill. He asked me then if I thought that $25 was not enough for cleaning up the property, and I says, 'No, sir, it is not,' and that was all that was said in regard to it at that time, and he took the train and went south. The watchman was dismissed on the morning of the 12th. I did not go near the mill on the next day, or pay any attention to it. They at that time had a lot of lumber in the mill-yard. The mill burned down on the morning of the 13th of July."

At this point, counsel for plaintiff was interrupted by the court, and asked to explain how he expected to recover on this evidence. Plaintiff's counsel then made the following offer:

"We offer to prove that at the time of the fire there was yet in the mill itself, and upon the rollways in and about the operating portion of the mill, a considerable quantity of the regular cut of lumber belonging to the defendants, and not yet by them removed from the mill. We also offer to prove that there was from 2,000 and upwards of feet of logs yet in the yard adjacent to the mill, uncut, good merchantable logs."

Counsel further stated that he was prepared to bring

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the fire home to defendants, and to show why plaintiff did not make a claim for damages at the time that he received the balance of the $500, on July 23; and that he was also prepared to show that there was fire in the sawdust on July 11, and that the fire which destroyed the mill originated in the rubbish. The court refused to receive the testimony, holding that the mill had been turned over to plaintiff on July 11, and that the obligation imposed upon defendants, by the lease, to maintain a watchman and care for the mill ceased at that time, the premises having been surrendered to plaintiff.

The court erred in finding, as a matter of law, that the defendants had surrendered possession, and that plaintiff had assumed the care of the mill. Plaintiff had not rested his case, did not claim to be entitled to recover upon the case thus presented, and had advanced no theory inconsistent with the case set forth in his declaration. His contention was that defendants were still in possession when the fire occurred; that White had no authority to surrender possession; that plaintiff had refused to accept possession of a part of the premises.

The judgment is reversed, and a new trial ordered, with costs.

The other Justices concurred.

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WILLIAM E. WESSELS v. WASHINGTON BEEMAN AND CHARLES W. TANN.

[See 66 Mich. 343.]

Fraudulent conveyances—Trover—Evidence—Violation of internal revenue laws.

1. Title in a third person may be shown as a defense in an action of trover; citing *Seymour v. Peters*, 67 Mich. 415.
2. In the investigation of fraud it is usual to permit a wide range of investigation of matters that will throw light upon the question at issue, but irrelevant testimony is no more admissible in such cases than in any other investigation or trial of civil actions at law.
3. In an action of trover by a vendee against an execution creditor of the vendor, the defendant cannot set up as a defense that the sale was in violation of the United States internal revenue laws, when neither of the parties has repudiated the contract, and it has been fully executed.
4. The title of the United States to goods forfeited by reason of their sale in violation of the internal revenue laws is not consummated until after judicial condemnation, when it relates back to the time of the commission of the offense (*Caldwell v. United States*, 8 How. 381); and, in trover by the vendee for the conversion of the goods, evidence of such forfeiture, offered for the purpose of showing title in a third person, is inadmissible, unless supplemented by proof of such condemnation.
5. The tendency of testimony to prove a disputed fact is exclusively for the jury, and it is error for the circuit judge to add the weight of his opinion as to what the testimony tends to prove.
6. A creditor received from a debtor certain real-estate mortgages and a bill of sale of personal property in payment, as he claimed, of an existing indebtedness. About two months afterwards the debtor made a general assignment of all his property to a third party for the benefit of his creditors, and the assignee sold the equity of redemption in the mortgaged premises at public auction, and the creditor (mortgagee) became the purchaser

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of a portion of the land covered by his mortgages. In a suit brought by the creditor against a *judgment* creditor of the debtor, who had sold the property covered by the bill of sale on execution, the defendant was permitted to prove said assignment and sale by the assignee, which testimony is held admissible; there also being testimony in the case tending to show that the debtor contemplated making the assignment before the transactions with the plaintiff.

6. In a suit between a plaintiff claiming personal property under a bill of sale absolute on its face, and a creditor of the vendor, the jury may consider the fact that the vendee filed the bill of sale in the office of the township clerk of the proper township as evidence bearing upon the claim made by him that the transfer was absolute, and not by way of security.

Error to Gratiot. (Hart, J.) Argued July. 1, 1891. Decided July 28, 1891.

Trover. Plaintiff brings error. Reversed. The facts are stated in the opinion, and in the former report of the case, found in 66 Mich. 343.

C. J. Willett, for appellant.
Sawyer & Knowlton, for defendants.

CHAMPLIN, C. J. This is an action of trover, brought to recover damages for converting some tobacco and cigars, of which plaintiff claims to have become the owner by purchase from one Aaron Wessels, who appears to have been a manufacturer, dealer, and general trader in the village of St. Louis, Gratiot county, Mich.[1] Upon the trial, the plaintiff in the first instance contented himself by proving the ownership of the property in Aaron Wessels, a sale by Aaron Wessels to him, evidenced by a bill of sale dated November 17, 1883, and by introducing testimony tending to show a delivery of the property, its

[1] The declaration includes other property (see first paragraph of former opinion), but the plaintiff only claimed to recover a verdict for the value of the tobacco and cigars.

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value, and the conversion of the same by the defendants.

The defendant Beeman was a judgment creditor of Aaron Wessels, and defendant Tann was under-sheriff, and the defense interposed is that the conveyance by Aaron Wessels to William E. Wessels, the plaintiff, was fraudulent and void as to the creditors of Aaron Wessels.

A further defense relied upon with reference to the alleged sale from Aaron to William was based upon the fact that a large number of the cigars were unstamped, and were forfeited to the United States government under the Revised Statutes of the United States, §§ 3400, 3405.

The case was before us at the April term, 1887, and is reported in 66 Mich. 343. Only one of the points then raised—but not decided—is before this Court now; and, were it not for the reason that we feel it our duty to reverse the case and send it back for another trial for error in the rulings upon the admission of testimony and in the charge of the court, it would not be necessary to decide that point now, which is, whether the sale of unstamped cigars passed any title to the plaintiff. The defendants' counsel contend that no title passed, and cite: Rev. Stat. U. S. §§ 3397, 3398, 3400, 3404, 3405; *Miller v. Post*, 1 Allen, 434; *Insurance Co. v. Harvey*, 11 Wis. 394; *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 Barn. & C. 93; *Cope v. Rowlands*, 2 Mees. & W. 149; *Fergusson v. Norman*, 5 Bing. N. C. 76; Benj. Sales, § 538; Anson, Cont. 172, 173; *Miller v. Morrow*, 3 Cold. 587; *Wayman v. Torreyson*, 4 Nev. 124; and other cases.

It appears from the testimony that the plaintiff, at the time he received the bill of sale, received also from his vendor, Aaron Wessels, the key of the room where the cigars were stored, and also the key of the barn where the tobacco was stored, and that he placed one Garbutt in control thereof as his agent; that he went to the town clerk's office, and filed his bill of sale among the chattel-

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mortgage securities; that he was told by the deputy-clerk that if it was an absolute sale of the property, and he had actual possession of it, filing was not necessary, and he replied that he had the key of the room where it was stored in his pocket, and insisted upon filing the instrument, which was done on the 19th day of November, 1883. No affidavit of renewal was filed, and, after more than a year had expired, defendant Beeman seized the property under his execution, and it was sold at sheriff's sale.

Defendants claim that, as plaintiff had filed the bill of sale, he was estopped from denying that it was intended for security, instead of an absolute transfer, and requested the court so to charge. The court declined to do so, but instructed the jury that they might consider the fact that plaintiff had filed the bill of sale as evidence bearing upon the claim made by him now, that the sale was absolute. The plaintiff excepted to the latter part of the charge. There was no error in this portion of the charge. It was proper for the jury to consider the fact in determining whether it was an absolute sale, as claimed by plaintiff, or intended as a security, as claimed by defendants. If the jury found that there was an absolute sale, then the question of delivery and actual and continued change of possession was important, for, if there was no actual delivery, followed by a continued change of possession, the burden of proof was upon the plaintiff to show that the sale was made in good faith, and without any intention to defraud creditors; but if it was intended as a security, and the affidavit was not filed as required by the statute, then it would be void as against such creditors as should acquire a lien after the expiration of a year and before the filing of the renewal affidavit; and in this case it is conceded that no renewal affidavit was filed.

The act of the party in filing a bill of sale had some

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significance upon the question as to whether it was an absolute transfer or only a security. If, as plaintiff contends, the bill of sale evidenced an absolute transfer of the property to him as purchaser, yet he is not estopped from so asserting, notwithstanding he filed the bill of sale in the clerk's office. The attorney of the defendants was informed, when the instrument was placed upon record, that the plaintiff claimed he had possession of the goods; that he had the key in his pocket of the room in which they were stored; so that, so far as the defendants were concerned, the filing was not such an unequivocal act as would estop plaintiff from asserting that the instrument was a bill of sale absolute, and not intended for security;[1] but, further than this, there is no estoppel pleaded, and the testimony was not admissible without being embraced in the pleadings, or the facts constituting it set out in the notice. *Johnson v. Stellwagen*, 67 Mich. 14, and cases cited.

It was also claimed by the defendants that the sale was made with intent to hinder, delay, and defraud the creditors of Aaron Wessels. In the investigation of this question the defendants were permitted a wide and almost unbounded range of inquiry concerning transactions prior and subsequent to the sale to plaintiff, and concerning matters with which the plaintiff had no connection whatever. In the investigation of fraud it is usual to permit a wide range of investigation of matters that will throw light upon the questions at issue, but irrelevent testimony is no more admissible in trying questions of fraud than in any other investigation or trial of civil actions at law. I think the court went far beyond what is allowable in the trial of such issues, and a great mass of testimony was admitted bearing upon the good faith and fair dealing of Aaron

[1] The attorney was deputy town clerk, and was present when the bill of sale was filed with the clerk.

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Wessels, plaintiff's vendor, entirely disconnected with the transaction between him and the plaintiff, which could have had no other effect than to prejudice the minds of the jury, and call their attention away from the real issue which they were called upon to decide.

The plaintiff's claim was that he was a creditor of Aaron Wessels; that he had loaned him money, for which he had received the promissory notes of said Wessels; and on the 17th of November, 1883, he settled with Aaron Wessels, and received the mortgages, and goods included in the bill of sale, in full discharge of such indebtedness. The defendants' claim was that plaintiff was not a creditor, or, if at all, not to the amount he claimed, and that the execution of the mortgages and the bill of sale was for the purpose of hindering, delaying, and defrauding defendant Beeman and other creditors from collecting their debts. There was testimony introduced tending strongly to prove that Aaron Wessels was engaged in an attempt to defraud his creditors. But such intent would not affect *bona fide* transactions between Aaron Wessels and any of his creditors who received from him money, property, or security for their debts, unless they participated with Wessels in an attempt to defraud the other creditors.

The questions here are:

1. Was the plaintiff a creditor to the amount claimed by him?

2. Did he settle and receive the mortgages upon real estate and the property mentioned in the bill of sale to satisfy such indebtedness?

3. Was there such a disproportion between the value of the property received and the indebtedness due to plaintiff as to raise the presumption of want of good faith, and justify the inference that the conveyances were made as mere clouds to shield the property from the reach of the other creditors?

4. Was the property in question in this suit, covered

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by the bill of sale, delivered, and followed by an actual and continued change of possession?

Any testimony tending to throw light upon these questions, and also upon the intent of Aaron Wessels in making the trade, was admissible.

It was not admissible for defendants to show that, in January following the transaction with the plaintiff in November, Aaron Wessels made a general assignment for the benefit of his creditors, and that the assignee sold the equity of redemption in the premises mortgaged at public auction, without further showing that the plaintiff was in some way connected with these subsequent transactions, or that they occurred pursuant to an arrangement between Aaron Wessels and plaintiff, made at or before the conveyances to him, and as a part of the fraudulent scheme.[1] Plaintiff's counsel contended that there was no testimony whatever tending to show that the plaintiff was in any manner connected with a scheme for making an assignment; that the fact that he purchased some of the property covered by his mortgages at assignee's sale did not have a tendency to show that he was connected with the assignment, any more than would the fact that other parties bought some of the property covered by these mortgages at such sale tend to show that they were connected with the assignment. There was testimony tending to show that Aaron Wessels contemplated making an assignment about the 1st of November, 1883, before the transaction with the plaintiff; and the testimony was relevant as tending to show the dealings of the plaintiff and Aaron Wessels with the property which he claims to have received in payment of his indebtedness. It may have had a bearing upon the

[1] At the time of taking the bill of sale of the tobacco and cigars, plaintiff received from Aaron Wessels certain mortgages on real estate, and at the assignee's sale he purchased a portion of the mortgaged premises.

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question of the good faith of the transaction, and should have been and was submitted to the jury for their consideration in connection with the rest of the testimony in the case. There was no error, therefore, in admitting that testimony, for the reason, as stated, that plaintiff purchased property at the assignee's sale covered by his mortgages.

The counsel for plaintiff further contends that defendant Beeman as a creditor should have presented his claim to the assignee, and that the assignee is the only one who had authority to inquire into and contest the validity of the sale to the plaintiff as being a fraud upon the creditors. But this is a case where the plaintiff has sued the defendants for converting his goods to their own use. The burden of proof is upon him to show his title to the goods at the time of the alleged conversion; and if the defendants could not be justified in seizing the goods as Aaron Wessels' property because the title was vested in the assignee, neither could the plaintiff maintain trover for them if such title was not in him, but was in the assignee. It is a defense in trover to show title in a third person. *Seymour v. Peters*, 67 Mich. 415; *Ribble v. Lawrence*, 51 Id. 569.

The circuit judge permitted a witness for the defendants to testify to what persons—some of whom inspected the tobacco with a view of becoming bidders at the sheriff's sale, and others who were such bidders or were present at such sale—said respecting the bad quality of the tobacco. It needs no argument or reasoning to demonstrate that such testimony is hearsay, and therefore inadmissible. If defendants could be permitted to swear to what persons said in derogation of the quality of the goods, plaintiff could with equal propriety introduce witnesses to show what people had said extolling the qualities of the goods.

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Counsel for the defendants was permitted to offer in evidence writing which he said he had written with the same pen and the same ink for the purpose of illustrating the different shades that ink may take upon different kinds of paper, although written with the same pen and ink, and at the same time. He said that it was admitted that he wrote them, and wrote them then and there, at the clerk's desk. Counsel for the plaintiff objected for the reason that it was immaterial and incompetent. The court received the evidence. We do not see what relevancy such testimony had or could have to the issue. So far as appears from this record, it should have been excluded.

The question whether there had been a delivery of the goods sold, followed by an actual and continued change of possession, was one of the most vital issues in the case. In his charge to the jury upon this issue the circuit judge said:

"It is for you to say from the testimony whether or not it was such a changed and continued possession as I have indicated as necessary; only I have this to say: That, if Mr. William E. Wessels did take possession of the property, and then turn it back to Aaron Wessels for him to manage (as I think there is some testimony tending to show), I do not think that is such a continued change of possession as the statute contemplates."

The circuit judge erred in stating to the jury that there was some testimony tending to show that plaintiff took possession of the property, and then turned it back to Aaron Wessels for him to manage. We have frequently held that the tendency of the testimony to prove a certain fact is exclusively for the jury, and it is error for the circuit judge to add the weight of his opinion as to what it tends to prove, when there is a dispute in the testimony upon a point. *Perrott v. Shearer*, 17 Mich. 48;

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Blackwood v. Brown, 32 Id. 104; *Hayes v. Homer*, 36 Id. 374.

We do not think the testimony relative to the removal of the cigars, the failure to box and stamp, and the selling of unboxed and unstamped cigars was admissible in this case. The object of introducing such testimony was to prove title in a third person, namely, the United States; and it is claimed, and correctly so, in my opinion, that forfeiture, under the Revised Statutes of the United States referred to, must be deemed to have attached at the moment the offense was committed, and hence the title then vested potentially in the United States, so as to cut off all sales made afterwards, as well as all liens. But the title of the United States to the goods forfeited is not consummated until after judicial condemnation, and then it relates back to the time the offense was committed. The law requires proceedings to be instituted for the purpose of ascertaining the fact of forfeiture. *Caldwell v. U. S.*, 8 How. 381, 382. There was no testimony introduced, and none offered, to show that the United States had taken any steps to enforce the forfeiture, although its revenue officers were acquainted with the facts. If no proceedings are instituted within five years, the statute of limitations bars a proceeding by the government where there are no obstacles to its proceeding within that time, in which case the forfeiture may be considered as waived.

We do not think that third parties can set up the illegality of a sale in violation of the revenue laws to defeat an action brought against such third persons for intermeddling with the property, or converting it to their own use, when neither party to the contract has repudiated it, and the contract has been fully executed. To permit it would be to introduce and require the determination

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of collateral issues without the parties to such issues being before the court, and over which this Court has no jurisdiction. A great deal of the testimony introduced upon the trial had relation to these collateral issues. The cross-examination of Aaron Wessels, the opinion testimony of handwriting, the suggestions of false and fraudulent entries, were such as to influence the minds of the jury, and affect their verdict, upon the question of the good faith of plaintiff's purchase,—an influence which the charge of the court was not calculated to remove. After letting in this mass of testimony against plaintiff's objection, the court merely instructed the jury:

"It is claimed by the defendants that this sale was void, because made in violation of the revenue laws of the United States, if made at all, and passed no title to plaintiff; and they ask me to direct you to render a verdict for the defendants, for this reason, of not guilty. This request of the defendants is refused."

The whole tendency of the testimony was to impress the jury with the idea that the fraud upon the revenue laws was in some way connected with the sale to plaintiff, and that no title passed to him by the sale. We think the error was prejudicial.

The judgment must be reversed, and new trial ordered.

The other Justices concurred.

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OCTOBER TERM, 1891.

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WILLIAM S. WILSON v. WILLIAM NEWTON, CIRCUIT JUDGE OF GENESEE COUNTY.

Officers—County clerk—Right of woman to act as deputy.

The office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, his choice is not confined to any race, *sex*, color, or age.

Mandamus. Submitted May 13, 1890. Denied June 13, 1890, and opinion filed October 6, 1891.

Relator applied for *mandamus* to compel respondent to quash a writ of attachment. The facts are stated in the opinion.

Durand & Carton, for relator.

Mark W. Stevens, for respondent.

Martha Strickland, of counsel, for respondent, after reviewing in an elaborate brief the question of the right of a woman to hold an office of the character of the one in question under the common law and under the Constitution of Michigan, in conclusion contended:

In view of the common-law authority for women holding ministerial offices; the absence of constitutional qualifications for the

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office of county clerk; the fact that in England and our country women have been held eligible to elective offices without reference to their possession of elective privileges; the fact that they have for a long period of time in this State held the same and similar offices; that this Court permits them, in the case of attorney at law, to act as its officers; that there are no rules of interpretation which would sustain an opposite construction of our Constitution; that there has been established a practical construction by the people, never questioned in this Court until now; that to hold otherwise would create alarming confusion of property and personal rights, and debar a whole class of citizens from the privilege of employment which it has for years possessed,—we insist that the office of deputy county clerk can be legally held by a woman, and the writ of attachment is valid, and should not be quashed.

CHAMPLIN, C. J. This hearing is upon an order requiring respondent to show cause why he should not quash a writ of attachment, referred to in the affidavit of the relator, for the reason that said pretended writ is void, in that it was prepared, issued, and signed by one Marguerite E. Burr, a deputy county clerk; that said Marguerite E. Burr is a woman, and, being so, cannot, under the Constitution and laws of the State of Michigan, hold the office of deputy county clerk, or perform any of the duties of that office.

Article 10, section 3, of the Constitution provides that in each organized county there shall be chosen by the electors thereof a county clerk, whose duties and powers shall be prescribed by law. The duties and powers of the county clerk are prescribed by How. Stat. §§ 571–577. Other duties are prescribed by other provisions of the law. Section 573 authorizes the county clerk to appoint one or more deputies, to be approved by the circuit judge, one of whom shall be designated in the appointment as the successor of such clerk in case of vacancy from any cause, and to revoke such appointment at his pleasure, and the deputy or deputies may perform the

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duties of such clerk. The next section makes him and his sureties responsible for the acts of his deputy or deputies, and in case of vacancy in the office of clerk by death, etc., the deputies shall severally perform the duties of clerk until the vacancy is filled.

The following is the written appointment of Miss Burr:

"STATE OF MICHIGAN, } ss.
Genesee County, }

"By virtue of the power in me vested by the statute in such case made and provided, I, George O. Crane, clerk of said county, do hereby constitute and appoint Marguerite E. Burr deputy clerk of said county, to hold office during my pleasure.

"Given under my hand at the city of Flint, Genesee county, this 3d day of June, A. D. 1889.

"GEORGE O. CRANE,
"Clerk of Genesee County.

"I approve the above appointment.

"WILLIAM NEWTON,
"Circuit Judge."

Miss Burr subscribed and swore to the constitutional oath of office, and entered upon the duties of deputy clerk. It will be noticed that in this appointment she is not designated as successor to the clerk.

The relator contends that under the provision of the Constitution none but an elector can be chosen to the office of county clerk. In this I think he is correct, but its decision is not essential to the determination of the present case. He further contends, as a necessary consequence, that no one except an elector can be appointed deputy, for the reason that such person may by the statute and the appointment become successor to the clerk until a vancancy can be filled. Miss Burr is not designated as his successor, and if she were it does not follow that the successor during the temporary time in which a vacancy occurs must be an elector. The elect-

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ors have the constitutional right to choose their county clerk, and no one could be appointed for a full term to fill the position in an organized county; but in case of vacancy, the law may provide that another person may be appointed to fill the position and discharge the duties of the office. This is essential for the transaction of the public business, and it is competent for the Legislature to provide that the county clerk may appoint his own successor until a vacancy can be filled in the manner provided by law.

The office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, he has authority to appoint whomsoever he pleases. The person appointed acts for him; or, in other words, he acts through his deputy. His choice is not confined to any race, sex, color, or age. *Moore v. Graves*, 3 N. H. 408; *Golding's Petition*, 57 Id. 146 (24 Amer. Rep. 66); *Jeffries v. Harrington*, 11 Colo. 191 (17 Pac. Rep. 505).

There was no error in the denial of the motion to quash the writ.

LONG and GRANT, JJ., concurred.

MORSE, J., concurred in the result.

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HARRY HULL v. CORNELIUS J. REILLY, CIRCUIT JUDGE OF WAYNE COUNTY.

[See 86 Mich. 449.]

Criminal law—Admission to bail—Mandamus.

After a respondent was convicted of murder, which conviction was reversed, he was admitted to bail. Pending his second trial he was ordered into custody, and a *mandamus* to compel the circuit judge to admit him to bail is denied.

Mandamus. Submitted October 6, 1891. Denied October 7, 1891.

Relator applied for *mandamus* to compel respondent to admit him to bail. The facts are sufficiently stated in the opinion.

John G. Hawley, for relator.

PER CURIAM. Petitioner was convicted of murder in the Wayne circuit court, which conviction was reversed by this Court, and a new trial ordered, and the prisoner admitted to bail.[1] A second trial is now in progress, and the circuit judge has ordered him into the custody of the sheriff of Wayne county. He has applied to the judge to admit him to bail, and he has declined. We are asked to compel the circuit judge by *mandamus* to admit relator to bail pending trial. We decline to do so, and the writ is denied.

[1] See 86 Mich. 449.

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THE BLODGETT & DAVIS LUMBER COMPANY (A CORPORATION) v. RICHARD G. PETERS AND FINLEY MORRISON.

Waters and water-courses—Riparian rights—Boundary line.

1. Complainant and defendants own adjoining parcels of land bordering upon the waters of Green Bay, which is a part of the waters of Lake Michigan, and navigable for all classes of vessels. Both parties own and are operating saw-mills, and have constructed wharves to the deep water of the bay, upon which to pile and from which to ship their lumber. The question in dispute in this case relates to the division line of their respective holdings, under the waters of the bay, in deciding which the Court adopt the Massachusetts rule, which is defined as follows:

   a—To measure the whole extent of the ancient bank or line of the cove or bay, and compute how many rods, yards, or feet each riparian owner upon such line has.

   b—To divide the newly-formed line into as many equal portions as those contained in the shore line, and then draw straight lines from the point at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed line.

2. This rule may require modification under particular circumstances in order to secure equal justice, and, in ascertaining the shore line or margin of the water, a general line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp projections, so that that line shall embrace the general available line of the shore.

3. The object to be kept in view in cases of this kind is to secure to each proprietor access to navigable water, and an equal share of the dockage line at navigable water in proportion to his share on the original shore line of the bay.

Appeal from Menominee. (Stone, J.) Argued April 9, 1891. Decided October 9, 1891.

Bill to determine boundary line between adjoining

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riparian proprietors. Complainant appeals. Decree reversed and case remanded. The facts are stated in the opinion.

Sawyer & Waite, for complainant, contended:

1. The right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises, —the right itself to reclaim, improve, or occupy,—is a property right vested in him, recognized and protected in the law as property; citing *Brisbine v. Railroad Co.*, 23 Minn. 114; *Carli v. Railway Co.*, 28 Id. 373; *Yates v. Milwaukee*, 10 Wall. 497; *Bell v. Gough*, 23 N. J. Law, 624; *Delaplaine v. Railway Co.*, 42 Wis. 214.
2. The barest strip of upland, though wholly valueless and useless in itself, justifies the owner in the exercise and enjoyment of the privileges of riparian proprietorship to the fullest extent, and any person who may acquire from the riparian owner his right to improve and occupy said premises may always have access to them by means of navigable water, a common highway; citing *Hanford v. Railroad Co.*, 43 Minn. 104; Gould, Waters, §§ 149–153.
3. In the case of *Wonson v. Wonson*, 14 Allen, 83, the method contended for by complainant is distinguished and adopted in a case similar to this, and Mr. Justice Gray says that "the ordinary mode * * * of applying the general principles stated at the beginning of this opinion, to the division of flats in a cove, is to take the whole length of the upland at high-water mark, ascertain each owner's proportion, and give him the same proportion on the low-water line, and in the same order, and then draw the side lines straight from each proprietor's lines at high water to his corresponding point at low water;" citing *Ashby v. Railroad Co.*, 5 Metc. 370; *Walker v. Railroad Co.*, 3 Cush. 22, 28.
4. Rights in water in no way depend upon the side lines upon the land; citing *Clark v. Campau*, 19 Mich. 325; and a riparian owner has the right to dock out far enough to meet the demands of navigation upon the waters adjacent to which he owns; citing Gould, Waters, §§ 180, 181; *Lincoln v. Davis*, 53 Mich. 375; *Jones v. Lee*, 77 Id. 35.
5. When the shore curves or bends, two objects are to be kept in view, namely, to give to each proprietor a fair share of the land, and to secure to him convenient access to the water from all parts of his land, by giving him a share of the outward line proportioned to the shore of the line of high-water

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mark, or original shore owned by him. In such case the general rule is to measure the whole extent of the orignal shore line, then divide the new line into parts apportioned upon the holdings upon the original shore line, in the same order, and give to each owner the portion of the new line based upon his proportion of the original shore line; citing Gould, Waters, §§ 162–165; *Batchelder v. Keniston*, 51 N. H. 496; *Deerfield v. Arms*, 17 Pick. 41; *Gray v. Deluce*, 5 Cush. 9; *Rust v. Mill Corporation*, 6 Pick. 168; *Sparhawk v. Bullard*, 1 Metc. 95; *Jones v. Lee*, 77 Mich. 40.

B. J. Brown, for defendants, contended for the rule adopted by the court below, and commented upon the cases cited by complainant's counsel.

Uhl & Crane, of counsel for complainant, in reply, contended:

1. The court below arbitrarily determined the boundary line between the respective parties, upon the simple proof that the surveyor, who was sworn as a witness in the case, had drawn a line, and designated it as an "intermediate line," which he had no right to do; citing *Stewart v. Carleton*, 81 Mich. 270; *Cronin v. Gore*, 88 Id. 381; *Gregory v. Knight*, 50 Id. 61; *O'Brien v. Cavanaugh*, 61 Id. 368; *Fisher v. Dowling*, 66 Id. 370.
2. The jurisdiction to issue a mandatory injunction is exercised with extreme caution, and is confined to cases where the courts of law are unable to afford adequate redress, or where the injury cannot be compensated in damages; citing 1 High. Inj. § 2.
3. The waters of the bay should have been divided so as to give to the complainant at the line of navigability a width proportional to that which it had at the original shore line; citing *Rust v. Mill Corporation*, 6 Pick. 158; *Deerfield v. Arms*, 17 Id. 41; *Gray v. Deluce*, 5 Cush. 9; *Wonson v. Wonson*, 14 Allen, 71; *Johnston v. Jones*, 1 Black, 209; *Watson v. Horne*, 64 N. H. 416; *Clark v. Campau*, 19 Mich. 325.
4. The defendants intended to do the complainant an irreparable injury by excluding it from a portion of its docks, and should have been permanently enjoined from inflicting such injury; citing *White v. Forbes*, Walk. Ch. 112; *Middleton v. Booming Co.*, 27 Mich. 533; *Manufacturing Co. v. Railway Co.*, 64 Id. 114.
5. A littoral proprietor has a right to the water frontage belong-

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ing by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation; citing *Clark v. Campau*, 19 Mich. 328; *Yates v. Milwaukee*, 10 Wall. 497; and the rights of such a proprietor to the lands covered by water are the same as those of a riparian owner of lands bordering upon navigable streams within the State; citing *Lincoln v. Davis*, 53 Mich. 375.

6. The common boundary line between the parties is to be determined by extending a line from the boundary at the shore perpendicular to the center line of Green Bay; citing *Rice v. Ruddiman*, 10 Mich. 125; *Lorman v. Benson*, 8 Id. 18; *Clark v. Campau*, 19 Id. 328; *Gas Light Co. v. Industrial Works*, 28 Id. 182.

CHAMPLIN, C. J. The complainant is the owner of the following described parcel of land situated in the county of Menominee, in the State of Michigan, viz:

"Commencing at a point on the section line between sections thirty-four (34) and thirty-five (35), in township thirty-two (32) north, of range number twenty-seven (27) west, sixty-four (64) rods north of the quarter-section corner on said line; running thence east to the bay shore; thence northerly, along the line of said bay shore, to the section line between sections thirty-five (35) and twenty-six (26); thence west, along said section line, to the north-west corner of said section thirty-five (35); thence south, along the section line between said sections thirty-four (34) and thirty-five (35), to the place of beginning; together with all the riparian rights thereunto belonging or in any wise appertaining."

The defendants are the owners and in possession of the following described lands and premises, adjoining those of the complainant on the south, viz.:

"Commencing at a point on the line between sections thirty-four (34) and thirty-five (35), in township thirty-two (32) north, of range twenty-seven (27) west, 208.86 feet south of the quarter-section corner on said line; thence north, along said line, to a point sixty-four (64) rods north of said quarter-section corner; thence east to the bay shore; thence south, along the line of said bay shore, to the north line of the property conveyed to A.

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Spies by the Coleman Lumber Company, by deed dated May 15, 1885; thence north, eighty-four degrees and thirty-two minutes west, about four chains, to the place of beginning; together with all the riparian rights thereunto belonging or in any wise appertaining."

The lands border upon the waters of Green Bay, and the question in dispute relates to the division line of the respective holdings under the waters of the bay. Green Bay is part of the waters of Lake Michigan, and is navigable for all classes of vessels. The general course of the center line of the bay is, according to the United States survey, north 31 degrees 30 minutes east. The shore of the bay consists alternately of headlands and bays or coves, of greater and lesser dimensions. The map on following page shows the original shore of the bay, according to the United States government survey.

The land of complainant is shaded with horizontal lines, and the land of defendants with diagonal lines. There is a headland jutting out into the bay, marked on the map as "Point 2." Both parties own and are operating saw-mills, and have constructed wharves to the deep water of the bay, upon which to pile and from which to ship their lumber. The saw-mill of complainant is built about 500 feet easterly from Point 2, and it has constructed docks from this in a south-easterly direction a distance of nearly 700 feet, and at the end of such docks the water is from 12 to 15 feet in depth. The defendants have also erected a mill in the bay in front of their premises 500 feet from the shore line, and have constructed docks which extend in an easterly direction about 1,000 feet from the shore line, where the depth of water is from 12 to 15 feet. They have driven piles with the intention of still further extending their docks, and for booming logs, and, if perminted to do so, the lines of their docks will cross those of complainant, and pre-

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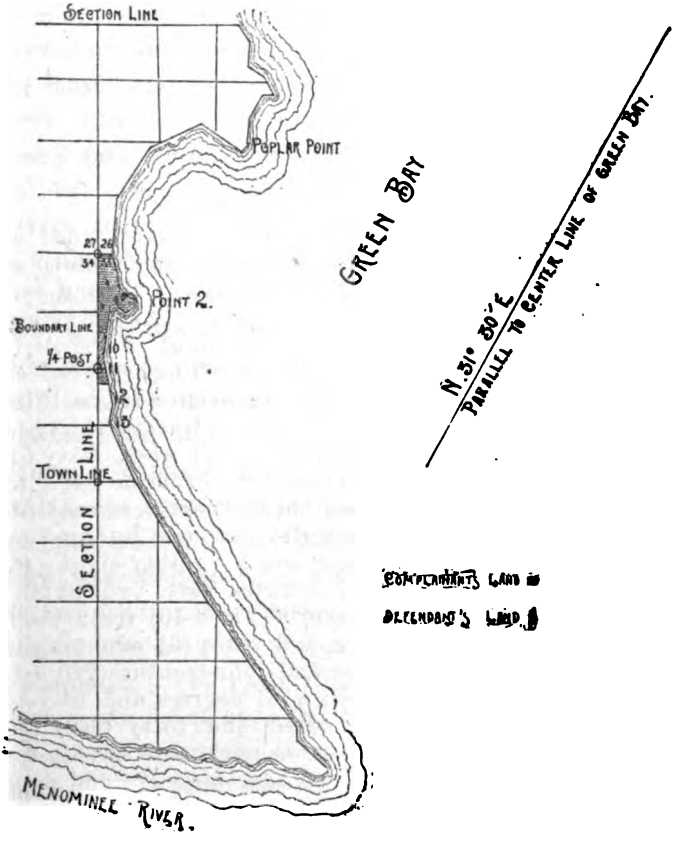
Map showing the original shore line, from north line of section 26 to mouth of Menominee river.



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vent access to the south side of complainant's docks, and cut off the land lying between such docks and the land of complainant from the privileges of navigable water. This bill is filed to prevent the execution of such work, and to settle the boundaries between the parties.

The defendants claim in their answer that the boundary line between the respective parties extends into the waters of Green Bay at right angles to the section line between sections 34 and 35 to the center of the most usual ship canal of the Green Bay.

The cause was heard upon the pleadings and proofs, and the court decreed as follows:

"The common boundary between the said lands and premises of the complainant and the said lands and premises of the defendants in the waters, and land lying under the waters, of the Green Bay, of Lake Michigan, within the limits of this decree mentioned, to be as follows: Commencing at a point where a line extended east from a point on the section line between sections thirty-four and thirty-five (34 and 35), in township thirty-two (32) north, of range twenty-seven (27) west, sixty-four (64) rods north of the quarter-section corner on said line, intersects said shore; running thence north, seventy-nine (79) degrees and eight (8) minutes east, one hundred and nineteen (119) feet; thence south, eighty-eight (88) degrees and forty-eight (48) minutes east, two hundred and twenty-nine and four-teenth (229 4-10) feet; thence south, eighty-two (82) degrees and three (3) minutes east, two hundred and twenty-nine and four-teenths (229 4-10) feet; thence south, seventy-six (76) degrees and fifty-two (52) minutes east, three hundred and forty (340) feet; thence south, eighty-two (82) degrees and twenty-nine (29) minutes east, seven hundred and thirty-six and eight-tenths (736 8-10) feet.

"And it is further ordered, adjudged, and decreed that said complainant, within six months from and after the date of this decree, do remove all piles, pilings, docks, and all other obstructions whatever by it erected or maintained on the said lands and premises of the defendants in the water, or on the lands under the water, of Green Bay aforesaid, south of the common boundary line

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between the same and the said lands and premises of said complainant, as herein defined and established.

"And it is further ordered, adjudged, and decreed that the said defendants recover of the said complainant their costs incurred in this suit to be taxed, and that the said defendants have execution therefor."

It appears from the proofs that this line was arrived at by dividing the shore line from Poplar Point to the mouth of the Menominee river into two distinct coves; the headlands of the northern cove being indicated by Poplar Point and Point 2 on the map, and the southern cove, by Point 2 and the intersection of the river with the bay. The surveyor, by a series of measurements and surveys, apportioned the distance upon the base line, drawn from the headland at Poplar Point to the mouth of the river, which the owners of the north cove would have in proportion to the shore line owned by them, and upon the map prepared by him had delineated the division line between the complainant's land and the owner next north of it by course and distance. He also made similar calculations and apportionments between those owning the shore of the south cove. Before the proofs were finally closed, the defendants introduced a map upon which was delineated the division line between complainant and its neighbor on the north, as before stated.

Section 35, as will be seen by a reference to the map, is fractional. The part lying north of the east and west quarter line is lot one, and the part lying south of such line is lot two, by the government survey. The surveyor who made the map last referred to drew right lines, one from the south-east corner of lot two to the point where the quarter line intersects the shore line of the bay, and the other from the north-east corner of lot one to the same point. He then projected a line from this point into the bay, dividing the angle made by the intersection of these two lines, and called it a "Medium Line."

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Those two lines, running from the corners of lots one and two, did not follow the shore of the bay, but in some places ran across the headlands, and in some places across the water. The line from the corner of lot one left the headland at Point 2 wholly upon the bay side. It entirely ignored its existence as a fact of any importance, although it had been used in forming the north cove and the division line of complainant's water-rights on the north. The surveyor then projected what he styled a "medium line," from the point where the eighth line of the section, produced east, intersected the shore line, into the bay, which he stated to be a medium line between the north boundary of complainant's water-rights and the medium line projected from the quarter post. He then drew another medium line between these last-named lines, starting it at the point on the shore where the south boundary of complainant's land touched such shore, and this he called the "division line upon the basis of least availability," and this line the court adopted in its decree. This line cannot be correct. The north line from which this medium line is calculated was based upon the full length of the shore of the north cove, and is the line of greatest availability for that cove, but this rule is ignored in getting the medium line on the south.

The object to be kept in view in cases of this kind is to secure to each proprietor access to navigable water, and an equal share of the dockage line at navigable water in proportion to his share on the original shore line of the bay. The lands bordering upon Green Bay derive the greater part of their value from the benefit of the public easement for landing-places, docks, or wharves in the vicinity of manufacturing establishments, and this is more particularly essential to mill-owners and manufacturers of lumber. Upon consideration of the authorities cited, we think the rule adopted by Massachusetts will,

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in cases like this, secure a nearer measure of justice than those adopted by the courts of any other state. We cannot deal with Green Bay as we could with the rivers in this State, where the lines are to be drawn at right angles to the thread of the stream. The rules laid down for the boundaries of owners of land bordering upon the ocean and great inland seas are more proper for the disposition of the case before us. The rule early defined in Massachusetts is:

1. To measure the whole extent of the ancient bank or line of the cove or bay, and compute how many rods, yards, or feet each riparian owner upon such line has.
2. To divide the newly-formed line into as many equal portions as those contained in the shore line, and then draw straight lines from the point at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed line.

It is freely admitted that this rule may require modification under particular circumstances in order to secure equal justice, and that, in ascertaining the shore line or margin of the water, a general line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp projections, so that the line shall embrace the general available line of the shore. This is exactly what the meanders run by the United States government do. The lines are run straight, disregarding indentations and projections which are not available for any general useful purpose. The shore line in this case is a meander line of the government survey, and we have by that survey the available line, not elongated by deep indentations or long projections. The headline at Point 2 is too important to be disregarded in tracing the shore line. It is nearly or quite 1,000 feet in length, and 400 feet in width. The United States government recognized it as of

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sufficient importance to be included in its meander line and computation of quantity of land in lot one, and it is available for beneficial use and enjoyment, and valuable for manufacturing purposes or a town site. The difficulty is greatest where the shores are irregular.

In the case before us the waters to be dealt with may be considered a cove from station 6 to station 12, map A, complainant's exhibits. There has been no survey made of the line of navigable water between these two points, which must be done before a final decree can be made. We suppose, however, that such a line will fall within a right line uniting the headlands of the cove as hereinafter described. Based upon this assumption, the proper rule to be applied is that laid down in *Wonson v. Wonson*, 14 Allen, 71, and in following this rule we direct the following method to be observed, namely:

1. Turn right angles to the shore lines from stations 5 and 6, and 6 and 7, at 6, on the east side thereof. Bisect the angle thus made, and produce a line from the point of intersection to navigable water, say to water 15 feet in depth that is navigable.

2. Turn right angles to the shore lines from stations 11 and 12, and 12 and 13, on the east side thereof, at 12. Bisect the angle formed by these lines, and produce a line from the point of intersection to navigable water 15 feet in depth.

The points thus reached upon these lines may be considered the headlands of the cove, between which draw a line upon the general course of navigable water of the depth of 15 feet, and divide this line of navigable water into as many parts as there are feet on the shore line between stations 6 and 12, and give to the complainant and defendants their proportionate share, according to their ownership of the shore line, and divide their proprietorship by straight lines running from the shore to

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the line of navigability. The map on page 503 will show the points referred to above.

The decree of the circuit court will be reversed, without costs to either party. The case will be remanded to the court below to take further proof to be made of the general line of navigable water 15 feet in depth, as indicated above, and proceed to decree in accordance with the method above described.

We do not think this is a case for imposing costs on either party in this Court, or in the court below.

MORSE, MCGRATH, and LONG, JJ., concurred. GRANT, J., did not sit.

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JOHN A. KALEMBACH v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Trial—Erroneous instructions to jury—Measure of damages—Error without prejudice—Pleading—Contributory negligence.

1. The law does not presume that a jury in a negligence case, which found a verdict for the plaintiff notwithstanding erroneous instructions by the court upon the law of negligence, were prejudiced thereby in their assessment of damages.
2. A declaration in a negligence case in which the only allegations of special damages were "that plaintiff had been put to great expense in procuring medicine, medical attendance, and care, in which he had expended the sum of $500 for physicians' services, nurses, and help," and that he was "greatly and permanently injured, suffered great physical and mental pain, and became sore, sick, lame, and languishing," is not sufficiently specific to admit testimony of any permanent injury.
3. The question of the contributory negligence of the owner of a runaway team, who takes it into a railroad freight-yard, and in close proximity to tracks over which cars are liable to pass at any time, is to be determined by the jury.

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Error to Washtenaw. (Kinne, J.) Argued May 13, 1891. Decided October 9, 1891.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Sawyer & Knowlton, for appellant, contended:

1. A trial judge, in charging the jury, should present the substantial issues of the case, and state the principles of law that govern the rights of the parties, whether any specific instructions are requested or not; citing *Barton v. Gray*, 57 Mich. 622.
2. The facts disclosed by the evidence bring this case squarely within the rule that, where the conduct of the defendant discloses such a degree of indifference to the rights of others as to be characterized as recklessness, the doctrine of contributory negligence does not apply, and the court should have so charged the jury. At least, there was evidence tending to show that the conduct of the defendant's servants was wanton, willful, or reckless in driving the cars down upon plaintiff without notice to him; citing *Shumacher v. Railroad Co.*, 39 Fed. Rep. 178; *Noble v. Cunningham*, 74 Ill. 51; *Matta v. Railway Co.*, 69 Mich. 109, 113; *Bouwmeester v. Railroad Co.*, 63 Id. 557; *Battishill v. Humphreys*, 64 Id. 514; Beach, Cont. Neg. § 22, p. 69; 2 Wood, Ry. Law, 1258, 1259.
3. The evidence also tends to prove that the conductor and trainmen in charge of the train saw the plaintiff's position, and heard him request them to hold on a second until he could get out, in time to have averted the injury, but, instead of stopping or attempting to stop the cars, they pushed down upon him, which management of the cars was characterized by negligence, and was equivalent to misdoing; citing *Shumacher v. Railroad Co.*, 39 Fed. Rep. 177-179; Cooley, Torts, 674; Patterson, Ry. Acc. § 55; *Price v. Railroad Co.*, 8 Amer. & Eng. R. R. Cas. 365.
4. The court instructed the jury that the plaintiff must *satisfy* them as to defendant's negligence, which must mean *beyond all doubt*, when he is only required to prove his case by a preponderance of evidence; citing *Mynning v. Railroad Co.*, 67 Mich. 677.
5. It was error to instruct the jury that "the plaintiff had no right to go upon defendant's premises, and place his team in the position he did, and shut his eyes, and demand that the company should not injure him. The mere fact of his being

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injured by reason of a car being backed into the one from which he was unloading is not of itself sufficient to render the company liable,"—because—

a—The plaintiff, having gone upon the defendant's grounds to receive a consignment of barrels, was lawfully there; citing Beach, Cont. Neg. § 17, p. 55; *Watson v. Railway Co.*, 66 Iowa, 164. He went to the place the defendant had provided to receive the contents of the car, and occupied the only place provided by defendant for him to occupy. He was there under a sort of an implied warranty upon the part of the defendant that he should not be injured by negligence upon the part of the defendant while there conducting his business; citing Patterson, Ry. Acc. § 208; *Railroad Co. v. Martin*, 41 Mich. 667; and he was under no obligation to keep his eyes open (that is, on the watch). He could not be charged with negligence because he failed to anticipate some particular act of negligence on defendant's part; citing *Iltis v. Railway Co.*, 40 Minn. 278; *Railroad Co. v. Martin*, 41 Mich. 667; and he had a right to give his undivided attention to his work, and was justified in assuming that the defendant would not molest him, or render his position hazardous, without giving him notice; citing *Railway Co. v. Goebel*, 119 Ill. 515; and the defendant owed him the duty of such care as is necessary for the safety of all persons engaged as plaintiff was, and it was not for defendant's employés to close their eyes, and excuse themselves by saying that they did not know that any one was being imperiled; citing *Watson v. Railway Co.*, 66 Iowa, 164.

b—The mere fact that plaintiff was injured by reason of a car being backed into the one from which he was unloading was negligence *per se*, and, unexplained, was sufficient to render the defendant liable; citing Patterson, Ry. Acc. §§ 375, 377; *Watson v. Railway Co.*, 66 Iowa, 164; *Noble v. Cunningham*, 74 Ill. 51; *Shumacher v. Railroad Co.*, 39 Fed. Rep. 174; *Mitchell v. Railway Co.*, 51 Mich. 236.

Henry Russel, for defendant.

GRANT, J. It is conceded in this case that the court properly instructed the jury upon the measure of damages, but it is claimed that the court erroneously instructed them on the questions of negligence involved. Upon all these questions the jury found for the plaintiff, and I deem it unnecessary to discuss them.

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It is insisted that the jury were probably prejudiced upon the measure of damages by improper instructions upon the law of negligence. I cannot accede to this proposition. The law casts no such reflection upon honest and intelligent jurors. The law does not presume that a jury, which found the defendant liable notwithstanding erroneous instructions by the court, has been prejudiced thereby in their assessment of damages, especially in a case like the present one. The verdict was for $150. What should have been the amount of damages so that the Court would say that they were not probably prejudiced? The result of this rule would be that a court must correctly instruct the jury upon all branches of every case, in order to avoid prejudicing the jury in their assessment of damages.

But, in determining the question as applied to the present case, it is proper to consider the allegations in the declaration as to the injury and the consequent damages, and the proofs. The only allegation of special damages is—

"That plaintiff had been put to great expense in procuring medicine, medical attendance, and care, in which he had expended the sum of $500 for physicians' services, nurses, and help."

It contains the general allegation that he was—

"Greatly and permanently injured, suffered great physical and mental pain, and became sore, sick, lame, and languishing."

No claim is made of injury to his horses or wagon. He called no physician, and expended no money for nursing, medicine, or help. There is no evidence that Dr. Champlin attended plaintiff, at any time, in consequence of sickness claimed to have been the result of this accident. There was no evidence that plaintiff was unable to attend to his work for more than two weeks,

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and this testimony does not come from the plaintiff himself, but from his son, who *thought* he was in bed four or five days, and that it was some two weeks before he got out. The declaration was not sufficiently specific to admit testimony of any permanent injury. No physician was called for the plaintiff, and the testimony of any permanent injury was of too indefinite a character to form any reasonable basis for an award of damages. Plaintiff's testimony on this point is as follows:

"I am hardly a day without headache ever since. My off side is kind of not exactly right. I cannot remember as well as I use to before I got hurt."

The evidence in regard to the headaches was stricken out by the court. Certainly no one would contend that the statement, "my off side is kind of not exactly right," would furnish any basis for the jury to award damages. How was it not right? and why was it not right? were questions the jury must answer; and there was nothing to connect this trouble, whatever it was, with the injury. How much should the jury have awarded because he could not remember as well as he did before? It would be absurd to base damages upon such evidence.

The testimony of his son John is no more satisfactory. It is as follows:

"Since the injury I have noticed that father was sickly like a great many times, and seemed to be almost out of his head, and would refuse to eat his meals, and the like of that; and, furthermore, he has had one or two sick spells since that, and he always gets them when he does something that he stoops over."

The other son testified:

"Since that time his mind does not seem to be as it was before, and his health has not been as it was before."

This loose and indefinite testimony constitutes all the

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evidence of any permanent injury there is in the case. The jury evidently ignored it as of no value, as, indeed, they should have done. I think the court would have been justified in instructing the jury that there was no evidence of any permanent injury for them to consider. If there was no permanent injury, the damages assessed were ample under the proofs.

There was evidence from the plaintiff's own witnesses that plaintiff had a runaway team at the time, and that this same team had run away with him and with others before. If he took such a team into this place, it was a proper question for the jury to determine whether he was guilty of negligence which contributed to the accident.

Under this record, I see no reason for holding that the jury were prejudiced by the alleged erroneous instructions. The errors, if any, were certainly not glaring ones.

Judgment should be affirmed.

CHAMPLIN, C. J., and MORSE, J., concurred with GRANT, J.

MCGRATH, J. *(dissenting).* Defendant's freight station at Chelsea is immediately west of Main street. The main siding is north of the main track. Just north of this siding, and near Main street, is Henning's apple warehouse. North of Henning's warehouse is Kempf's warehouse, the easterly end of which is near Main street, and the westerly end of which extends beyond Henning's warehouse. Another side track lies just south of Kempf's warehouse, with sufficient room between this side track and Henning's for a narrow roadway, which is used for the receipt and delivery of freight, and it was customary to load and unload freight upon this way. A flagman was on watch at the street crossing.

At the time of the accident, two box-cars stood on the

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side track opposite Kempf's warehouse. Plaintiff, with his team and wagon, on which was a hay-rack, was getting a load of barrels from the westerly car of the two named. His team faced the east, and stood just west of the easterly car, the two cars being a few feet apart. One Campbell, who was Kempf's foreman, was throwing the barrels from the car to the wagon, plaintiff was placing them upon the wagon, and one of plaintiff's hired men stood upon the ground and held the reins. Plaintiff was busy arranging the barrels, as they were being thrown upon the wagon faster than he could handle them. Another box-car stood upon the track some little distance west of the car at which plaintiff was engaged, and another car still west of that one. A west-bound freight came in upon another siding, which was south of the main track. The engine was detached, and backed in upon this side track, some distance from where plaintiff stood. No one in that vicinity was aware that the intention was to back up to the car at which plaintiff was stationed, as the conductor who was directing the movement of the engine was within two or three rods of where they stood. No one realized there was any danger until the next car west of plaintiff commenced to move east, when some one called to plaintiff.

He says:

"The first thing that attracted my attention, with regard to the danger of cars coming down there, was a gentleman, whom I did not know, saying to me, he did not know but they were going to move those cars in there. Then I stopped handling the barrels, and turned around, and just then the conductor came right across from behind the buildings, and made motions with his hands. I hallooed to him twice before he turned round; then he turned round, and I said, 'Are you going to back in here?' He said he thought so. I said, 'Just hold on a second, and let me get out of here;' and I told my hired man to throw up the lines to me, and he did, and before

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I fairly got hold of the lines the cars came down against the car loaded with barrels, and struck it so hard that it moved right east, along by the horses, and the horses were so scared I didn't know whether they would drop down or not. They got up in a minute, and jumped. I hardly had hold of the lines with one hand. The striking of the car made noise enough to scare me, to say nothing of scaring a team. The car went with me until I got thrown over, and I don't know how much further. I don't know whether the car ran against the hay-rack or it struck against the building, but the first thing I knew I was rolling off behind, and the hay-rack was torn to pieces."

The conductor was within two rods of plaintiff when plaintiff spoke to him. The car that stood east of that at which plaintiff was engaged was struck so hard that it was driven out into Main street.

Plaintiff complains of the instructions given to the jury. In the charge the court used the following language:

"The theory of the plaintiff in this case, upon which he bases his claim to recover against the defendant, Michigan Central Railroad Company, is that this company has been guilty of negligence,—that is to say, that this railroad company has done or omitted to do some act or deed which good and prudent railroading cannot sanction,—and that this negligence caused the injuries alleged.

"In order for the plaintiff to recover in this case, he must satisfy you, by a fair preponderance of evidence, first, that he himself has not been guilty of contributory negligence; that is to say, if the want of ordinary care and prudence on the part of the plaintiff in any degree contributed to this accident, the plaintiff cannot recover. In other words, if the plaintiff, by the exercise of due care and ordinary caution, could have avoided this injury, he cannot recover. I will state that to you again: In order for the plaintiff to recover in this case, he must satisfy you, by a fair preponderance of evidence, first, that he himself has not been guilty of contributory negligence, for, if the want of ordinary care and prudence on the part of plaintiff in any degree contributed to this

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accident, the plaintiff cannot recover. In other words, if the plaintiff, by the exercise of due care and ordinary caution, could have avoided this injury, he cannot recover. If, from the evidence in this case, you find that the plaintiff was not guilty of this contributory negligence which I have just described, then, for him to recover, he must further satisfy you that the defendant corporation, the Michigan Central Railroad Company, was itself guilty of negligence; that is, that the defendant company has failed to exercise that degree of care, caution, and prudence which good railroading demands.

"In a general way that covers the law in this case; but at the request of plaintiff's counsel I give you the following instructions:

"'It was the duty of the defendant * * * to have refrained from doing anything, or permitting anything to be done, without notice to the said plaintiff, while and so long as he was engaged in receiving and unloading said barrels from said car in manner aforesaid, that should create any *unnecessary and unusual* noise liable to frighten horses of ordinary gentleness. * * * *

"'It was the duty of the said defendant, while said plaintiff was so engaged in receiving and unloading the said barrels from said car with due diligence, to refrain from creating any *unusual and unnecessary* noise, or performing any act that would frighten horses of ordinary gentleness.'

[The words 'unusual' and 'unnecessary' were inserted by the court.]

* * * * *

"It was the duty of the plaintiff, when he entered upon the defendant's grounds, to observe the premises, and to do all that he reasonably could to guard against receiving injuries while upon such premises; and the greater the risk which he took in placing his team between the box-car and the warehouse, and the more dangerous the position was, the greater should have been his care to look out for and avoid all danger; and if he failed to exercise such care, and such omission on his part contributed to the injury, he cannot recover.

"It is for the plaintiff to show, by a fair preponderance of evidence, that the defendant was guilty of negligence in permitting a car to strike against the one from which the plaintiff was unloading barrels. The plaintiff must, therefore, first establish that the defendant knew, or, by the exercise of that prudence and care which good rail-

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roading demands, could have known, that plaintiff's team and wagon were between the box-car and the warehouse, and that defendant, after receiving such knowledge, or in the exercise of that prudence and care which good railroading demands, might have prevented the accident.

* * * * *

"The conduct of plaintiff's horses before the coming car struck the car containing the barrels may be considered by you in determining whether it was safe and prudent for the plaintiff to employ that team upon that service. If the plaintiff's team was fretful and easily frightened, and you find that gentle horses, not affraid of box-cars in close proximity, would not have run away under the circumstances, and that plaintiff was therefore guilty of negligence in driving said team into this place of danger, then plaintiff cannot recover.

* * * * *

"If you find that plaintiff knew or had notice that the other car might collide with the car containing the barrels, and that he might have avoided the injury by taking advantage of such knowledge, he cannot recover.

"It was the duty of the plaintiff, when he went upon defendant's premises, to realize that he was placing his horses in a position where the slightest motion of the car might cause them to run away; and it was his duty to keep a reasonable lookout up and down the side track, and to avoid, as far as he reasonably could, being left in that position when other cars should be coming. If he omitted to exercise any of those precautions, and was injured thereby, he cannot recover."

The plaintiff was rightfully, lawfully, and necessarily upon the defendant's grounds, in the ordinary course of business. He was in plain sight of the operators of the engine. There was testimony that he was seen by and spoke to the conductor, and defendant offered no testimony to relieve itself from the charge of negligence. Plaintiff asked the conductor, who was within two rods of plaintiff, if it was his purpose to back in there, and the conductor replied, "I think so," or "I should say so," and continued to direct the backing of the train in

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upon the car at which plaintiff was engaged. There was no dispute as to these facts. It was clear, not only that the defendant could have known and should have known, but that it actually did know, of plaintiff's presence. There was no testimony tending to show that any warning had been given to plaintiff. The defendant's negligence consisted in doing what it did, knowing of plaintiff's presence, without warning, rather than in the "failure to avoid" or "prevent" the accident. Plaintiff was entitled, while in that position, to the company's protection. The testimony showed a disregard of plaintiff's presence, and of the company's duty to him under the circumstances. He was not bound to presume that the cars might be or would be kicked against the car from which he was getting a load, with such force and violence as to kick the next car a distance of 30 or 40 feet, without any notice or warning to him. He had a right to expect that notice would be given before such an act was attempted. While, if he saw the train coming in that direction, it was his duty to do what he could to avoid the accident, he had no reason to expect that the train would be backed in upon him without warning, and that degree of watchfulness and caution was not required of him that would be required of a trespasser, or of one crossing the tracks without the knowledge of the trainmen. The position of plaintiff was not necessarily a dangerous one, provided the defendant exercised proper care, and did not violate its duty towards him.

"The law does not require men to be on a constant lookout for dangers that cannot be expected to exist so long as there is ordinary care used by those whose action is the only thing that can cause danger." *Grand Rapids & I. R. R. Co. v. Martin*, 41 Mich. 670.

It cannot be said, therefore, that it was plaintiff's duty to "keep a lookout up and down the track" for

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the unexpected to happen; nor could plaintiff be expected to "know or have notice that other cars might collide with that car," and it was error to instruct the jury that, if he might have avoided the injury by taking advantage of "such knowledge," he could not recover.

Again, the court says it was the duty of the plaintiff, when he went upon defendant's premises, to realize that he was placing his horses in a position where the slightest motion of the car might cause them to run away. The plaintiff had no reason to expect any motion of the car, and the movement of the car actually caused was not in any sense a slight or the slightest motion. Plaintiff's horses did not move, nor did they appear fretful or frightened, till this occurred. The plaintiff was not negligent for being where he was, nor does the testimony tend to show any negligence upon his part, at least until he became aware that the train was moving down upon him, and even then it is doubtful if he was liable to the charge of contributory negligence.

Plaintiff properly complains of the words "unnecessary and unusual" in the clause "any unnecessary and unusual noise." The noise created was that naturally resulting from the doing of the act complained of. It was neither unusual nor unnecessary, but followed necessarily and usually from the violent kicking of several cars against each other. The doing of a necessary act, or the making of a necessary and usual noise, at an improper time, and without regard to the peril of others, may be negligence.

These instructions were clearly erroneous. The court seems to have applied the law as to a trespasser, rather than as to one upon defendant's premises by invitation, and in the legitimate use of defendant's station grounds in the course of the very business in which defendant was engaged. The law makes a clear distinction between

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the person who intrudes upon another's premises for his own convenience, and the one who is there by invitation. Under the same circumstances, the one may be entitled to recover, and the other may not.

Plaintiff says regarding his own injury:

"I was struck on the right side of my face. It hurt me very much. I new nothing about myself for about 15 minutes. When I came to, I was sitting on a stoop of the tavern on the other side of the railroad, about four or five rods from where I was thrown. I was hurt on my right side, clear up on my head, and was lame so I could not walk. I have never got over it entirely,—got over the injury. I am hardly a day without headache ever since. My off side is kind of not exactly right. I cannot remember as well as I used to before I got hurt."

Another witness says:

"I saw the wagon upset, and ran over to where Mr. Kalembach was, and helped pick him up. He seemed to be unconscious, and I think he was."

One Schenk testifies as follows:

"I saw him at the time of the injury before he was taken up from the ground. He was mixed up among the barrels, wagon, rack, etc. They were on him and around him. He was senseless. I helped carry him up the street towards town. We carried him up about three rods, up in front of the old hotel, and he was pretty heavy for us, so we sat him down there, and rested him up against a post on the sidewalk, and some one made a remark about taking him inside. It seemed that was the first thing that he realized or understood, and he says, 'No, I don't want to go there; I want to go home.' And we insisted on his going. He finally wanted to have us take him up to our store, about three rods further on the same side of the street. We took him there, and fixed a place for him, and laid him down. He lay there somewhere near an hour, and kept wanting to go home. Some one spoke about having a doctor examine him, and he said h thought he was able to ride home; we could get him home, and then he could have treatment there;

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so I sent a boy up after my rig, and we got him in, and I drove him home. He complained pretty much all the way. It seemed to hurt him to ride, and he complained of his head. He had a gash on one side,—I think the right side. He said his head pained him fearfully, and he groaned, etc., pretty much all the while. There were three or four women at the house when we reached there, and some men, who assisted in taking him in. I assisted also. We put him into bed, and then I came away. There was blood on his face."

Plaintiff's son says:

"I think father laid in bed from that injury four or five days, and I think it was some two weeks or over before he got out of the house. * * * Since the injury I have noticed that father was sickly like a great many times, and seemed to be almost out of his head, and would refuse to eat his meals, and the like of that; and, furthermore, he has had one or two sick spells since that, and he always gets them when he does something that he stoops over. * * * Dr. Champlin attended my father when he was sick. He has been away from Chelsea about three years. The last I heard he was in Pennsylvania."

(Plaintiff was injured in 1886, and the trial was had in 1890.)

Another son testified:

"Since that time his mind does not seem to be as it was before, and his health has not been as it was before."

This testimony is uncontradicted. It tends to show that plaintiff received a serious and permanent injury. The jury found a verdict for $150. Plaintiff was entitled to a fair trial, and proper instructions to the jury. The instructions given did not state the law as applicable to the case made by the proofs, and were calculated to mislead and confuse the jury. This Court has held that the erroneous admission of testimony is presumptively injurious, and its reception reversible error, unless it is plain that it could not have affected the result. *Continental*

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Ins. Co. v. Horton, 28 Mich. 173; *Shipman v. Seymour,* 40 Id. 277.

In a number of cases it has been held that the judgment will not be reversed for an erroneous instruction if, from an examination of the record, this Court is satisfied that plaintiff in error was not prejudiced. *Barton v. Gray,* 57 Mich. 622; *Township of Monroe v. Whipple,* 62 Id. 560.

"If the result could not have been different under proper instructions," or the jury "could not have been misled," or "if the instructions did not tend in any degree to prejudice," or "could not have changed the result," the judgment will not be reversed. *Case v. Dewey,* 55 Mich. 116; *Morse v. Byam,* Id. 594; *Cummings v. Stone,* 13 Id. 70; *Sinclair v. Murphy,* 14 Id. 392; *Eberstein v. Camp,* 37 Id. 176; *Finan v. Babcock,* 58 Id. 301.

Can we say that "it is plain that these instructions did not affect the result," or that we are "satisfied that they did not," or that "the jury could not have been misled," or that "they could not in any way prejudice plaintiff," or that they did not "tend in any degree to prejudice him," or that "the result could not have been different" if the jury had been properly instructed? From a careful examination of the record, I am not prepared so to find.

While it is true that the jury found for the plaintiff upon the matters to which these erroneous instructions relate, yet plaintiff's right to recover is dependent upon defendant's negligence; and who shall say that whether or not the plaintiff receives his full measure of compensation does not depend somewhat upon the degree of negligence established by the testimony under the instructions given by the court? Damage alone will not

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support a recovery. There must be a wrong as well as damage. Both must be found by the jury.

It cannot be said that, by the court's erroneous instructions to the jury, the wrong may be made extremely doubtful without prejudice to plaintiff. In actions in tort, where the wrong and damage are so intimately related, and both must be established to support a recovery, the mere fact that a verdict was rendered for plaintiff will not create the presumption that erroneous instructions regarding the wrong did not affect the award of the jury. Indeed, the presumption is the other way, and the record and verdict must be such as to remove that presumption, or the judgment will not be allowed to stand. It will not do to say here that the jury did not believe plaintiff, or that his injuries were not so serious as he claimed. The presumption must be overcome, if at all, by what appears, not by speculation or the invention of possible theories.

The court's instructions were clearly erroneous, and were calculated to prejudice the jury. It does not satisfactorily appear that they did not have the effect which they were calculated to produce.

The judgment should be reversed, and a new trial ordered.

LONG, J., concurred with MCGRATH, J.

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WILLIAM BRYANT AND SEWELL D. BRYANT v. WILLIAM SMITH.

Statute of frauds—Contract for sale of goods—Part delivery.

Plaintiffs sued defendant for the breach of an agreement, which was reduced to writing but not signed, under which defendant agreed to sell and deliver, and plaintiffs to receive and pay for, 5 car-loads of wood at a stated price per cord. Defendant further agreed to sell and deliver to plaintiffs as much more of the same kind of wood as they should order at the same price. After delivering eight car-loads further delivery was refused, and plaintiffs are held not entitled to recover.

Error to Jackson. (Peck, J.) Argued June 3, 1891. Decided October 9, 1891.

Assumpsit. Defendant brings error. Reversed, and no new trial ordered. The facts are stated in the opinion.

Corbin & Hemans, for appellant.

Montgomery & Lee, for plaintiffs.

GRANT, J. This suit is brought to recover damages for the breach of an alleged executory contract.

Plaintiffs in their declaration claim that defendant sold them "all the slab-wood which he then had on hand, to wit, 500 cords, or that he would cut thereafter," at the price of 85 cents per cord. The wood was at Eaton Rapids, and was to be delivered at Jackson. After delivering eight car-loads, the defendant refused further delivery.

The contract rested in parol, and was therefore void by the statute of frauds, unless there was part delivery such as to take it out of the statute. If the contract

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was for all of the slabs which were at the time in defendant's mill-yard, then there is no doubt but that the delivery was a complete compliance with the statute.

The court below left the question of the contract to the jury, under proper instructions. The principles contained in these instructions are familiar to the profession, and it is unnecessary to repeat them here. Defendant insists that there was no contract for the sale of any specific amount under the plaintiff's own evidence. The jury rendered a verdict against the defendant for $300, the highest amount that could be awarded, as the suit was commenced in justice's court.

Both parties agree that their arrangement, whatever it was, was to be put in writing, and that the plaintiffs were to employ an attorney to draw up the contract. Plaintiffs immediately went to an attorney, and stated to him their agreement. The attorney drew it up, after having read to them a memorandum of the agreement as they had given it to him. Plaintiff Sewell shortly after obtained the contract from the attorney, and took it to Mr. Smith. Sewell testified that Smith said it was all right, and as they had talked. Sewell says it was as he understood their verbal arrangement. Plaintiffs both understood for some time that they were acting under that agreement. This agreement was never executed. Plaintiffs' counsel, in his opening to the jury, based his right of action upon the terms of this unsigned writing. This agreement, omitting the formal parts, is as follows:

"The party of the first part is to sell to the party of the second part five car-loads of good mill wood, to be delivered on the cars at the city of Jackson, Michigan, when ordered, at 85 cents per cord, all freight paid, and as much more of same wood as may be ordered by said second party, at same price (85 cents) per cord, delivered on cars at Jackson, with this understanding: That on all of said wood, after the first five cars, if there should

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be any excess of freight over and above 3½ cents per hundred, then each of said parties is to pay one-half of such excess freight. And it is further understood and agreed that said first party is not to sell any of said mill wood to any other party or parties in said city of Jackson as long as he is selling said wood to said second party.

"Said second party on their part do hereby promise and agree to take five car-loads of said mill wood delivered on cars, in city of Jackson, at price above stated, and to pay for the same in manner following: The first two car-loads to be paid for in 30 days from date of delivery, to wit, at Jackson, on cars, at 85 cents per cord, all freight paid; the next three car-loads on the same terms, to be paid on delivery. Then on all said wood ordered and sent to be delivered to said second party, after the first five car-loads, is to be delivered at Jackson, on cars, at same price, except that one-half of any excess freight, over and above 3½ cents per hundred, is to be added, and which they hereby agree to pay."

Under the evidence we think there was no question for the jury as to the terms of the contract between these parties, but that the court should have instructed the jury that this paper contained its terms. That the plaintiffs are not entitled to recover under this agreement is too plain to require discussion. The circuit court should have directed a verdict for the defendant.

Judgment reversed, and no new trial ordered.

The other Justices concurred.

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JAMES S. AYRES ET AL. v. HENRY C. DUTTON ET AL.

Location of institution—Aid subscription—Equitable lien.

Complainants are 16 of 147 signers of a subscription paper, by which the subscribers agreed to pay specified sums for the purpose of inducing defendant to erect a flouring-mill. The mill was erected, and, after operating it for over two years at a loss, the defendant sold the machinery, and was preparing to remove it, when complainants filed a bill to enjoin such removal, and for a decree declaring their subscriptions a lien upon the property. There was no express stipulation, verbal or written, that defendant should continue the business for any specified time. And it is held that the evidence establishes the fact that defendant fully complied with his agreement, and made an honest and faithful attempt to render the business a success, and that, having done this, he was no longer compelled to carry on the business, and had the right to sell and remove the machinery; and that, there being no express provision for a lien, none can be implied in favor of the complainants.

Appeal from Huron. (Beach, J.) Argued June 9, 1891. Decided October 9, 1891.

Bill to enjoin the removal of milling machinery, and to declare an equitable lien. Defendant Dutton appeals. Decree reversed, and bill dismissed. The facts are stated in the opinion.

James H. Hall (*W. L. Carpenter,* of counsel), for complainants.

W. T. Bope and *H. G. Snover* (*Q. A. Smith,* of counsel), for appellant.

GRANT, J. The complainants, 16 in number, are residents of the village of Port Austin. They, together with

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others, numbering in all 147, were desirous of having a flouring-mill built at said village. Conversation took place between some of the complainants and the defendant Henry C. Dutton, who was a practical miller, and then a stranger in that community. The result of these conversations was that Dutton offered to erect a mill of a certain capacity, provided that a bonus of $2,500 was raised by the citizens of the village and vicinity, and sufficient ground given on which to erect the mill. A meeting of citizens was called, and a committee of three was appointed, two of whom are complainants here, to complete the arrangement, and attend to the raising of funds. A subscription paper was drawn up, which reads as follows:

"In consideration of our mutual promises, and in consideration of and for the purpose of inducing H. C. Dutton to construct a roller process flouring-mill in the village of Port Austin, Michigan, of seventy-five barrels per day capacity, severally promise to pay to said H. C. Dutton the sums set opposite our respective names, as follows: Two-fifths thereof when the mill building is completed and ready for the machinery, and two-fifths thereof when the machinery is delivered at the mill ready to be set up, and the balance when the mill is completed of that capacity, and in operation, which shall be February 11, 1888.

"*Dated Port Austin, Mich., this* 12th *day of September*, 1887."

The subscriptions amounted to $2,374, of which $165 still remains unpaid.

Three of the complainants, Frederick, James, and Ebenezer Ayres, comprised the firm of Ayres & Co. They deeded the land to Dutton September 29, 1887, and at the same time Dutton executed an agreement with them by which, among other things, it was provided "that in case said flouring-mill to be erected upon said lots should

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be destroyed by fire within three years, and another flouring-mill of like kind and capacity is not erected upon said lots within said three years, or its erection begun within said three years, and completed within a reasonable time thereafter, said Dutton shall deed back said lots to said Ayres & Co.," or, if he was unable to reconvey, he should pay Ayres & Co. $300 as liquidated damages. These are the only two written documents in connection with the transaction. All else rests in parol.

The defendant Dutton erected the mill according to the terms and specifications, and carried on the business for about two years and a half. The investment was a losing one for him, and, after offering to sell the property to other parties, who are complainants in this suit, at a considerable sacrifice, he sold the machinery, and was proceeding to remove the same, when this bill was filed, and he was enjoined.

The original bill set up a bonus of $2,500 paid to Dutton, and prayed that said sum, with interest from the time of payment, be decreed to be paid into court for payment back to the several subscribers; that the complainants Ayres be paid the sum of $300; and that, in default of such payments, the defendants be enjoined from removing the mill. Subsequently complainants filed an amended bill, in which their prayer for specific relief was to enjoin the removal of the mill and its machinery. There was also a general prayer for relief. The court below found that the amounts subscribed were paid upon the equitable and implied consideration that Dutton should erect the mill, and operate it with ordinary business skill, and fairly attempt to make the same a profitable and permanent business; that it was not carefully and skillfully conducted; and that it was inequitable toward the subscribers to remove the mill. The decree

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was for a lien upon the mill and machinery for the amounts paid by complainants, and that, until such payments be made, defendants be enjoined from removing the machinery.

There was no express stipulation, either verbal or written, that Dutton should continue the business for any specified time. The building and plant were erected by Dutton as agreed upon, at an expense of about $10,500.

1. Complainants have failed to establish a case for the relief asked. Complainant Campbell is in default upon his subscription, and makes no offer to pay the balance due from him. The bill alleges that the agreement was for a bonus of $2,500; that this amount was subscribed and turned over to Dutton, and accepted by him as money. It is now conceded that the whole $2,500 was not raised or subscribed. It is neither alleged nor proven that Dutton received the subscription pledges as a fulfillment of the agreement on the part of the complainants and their co-subscribers. The demand of complainants, therefore, is in violation of the universal rule that they who ask equity must do equity.

2. It was undoubtedly contemplated by the subscribers and by Dutton that the business would be permanent, as the plant itself was permanent in character. It was undoubtedly also contemplated that the business would be successful. Neither party, therefore, thought of making any provision as to time. No bonus would have been subscribed, and Mr. Dutton would not have expended nearly all his means, if any serious doubt of the success of the enterprise had existed. The subscribers to the bonus gave no guaranty. It was a common venture, in which the subscribers staked their bonus of $2,500, and Mr. Dutton the balance, about $8,000. It would be against reason and common sense, under these circum-

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stances, to imply an agreement on the part of Mr. Dutton to continue the business at a loss. We have not before us the case of a successful business under like conditions, and upon such a case we intimate no opinion. It remains, therefore, to determine from the record presented to us whether defendant Dutton made a fair and honest effort to render the business a success, so as to warrant its continuance. The business was not successful, and the court below attributed the failure to want of care, skill, and attention on the part of Mr. Dutton. There is no charge or evidence of bad faith on his part. He fully complied with his agreement in erecting the mill. He had more at stake, and was more deeply interested in the success of the enterprise, than any other person. The chief complaint against him is that certain customers who took wheat to the mill did not receive good flour in return, and in some instances received short weights, and that in consequence farmers took their wheat to other mills, or sold it in other places. Several other mills of a like character were doing business not far from this one. Several millers testified in the case, and from the evidence it is at least doubtful whether the complaints against Mr. Dutton in this respect were more common than against millers generally. Several causes operated against Mr. Dutton, which it is not necessary to enumerate. I think the evidence establishes the fact that Mr. Dutton fully complied with his agreement, and made an honest and faithful attempt to render the business a success. Having done this, he was no longer compelled to carry on the business, and had the right to sell and remove the machinery.

3. It follows that the complainants did not, by their subscriptions, obtain a lien upon the mill plant. There was no expressed provision for a lien, and none can be implied in such a case as this. It would be most

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inequitable to hold that Mr. Dutton took all the risks, and, in the event of failure, must pay the subscribers, in addition to the large loss which he has incurred.

The decree of the court below is reversed, and bill dismissed, with the costs of both courts.

The other Justices concurred.

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THE BOARD OF HEALTH OF THE TOWNSHIP OF PORTAGE v. JACOB VAN HOESEN.

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Constitutional law—Eminent domain—Cemeteries.

Act No. 219, Laws of 1875 (How. Stat. §§ 4778–4787), which provides for the condemnation of land by corporations organized under Act No. 12, Laws of 1869 (How. Stat. §§ 4763–4777), to establish and maintain rural cemeteries, and by the board of health of any township, or the common council, board of health, or board of trustees of any city or village, is unconstitutional.

Certiorari to review proceedings for condemnation of lands for cemetery purposes. Submitted on briefs June 10, 1891. Petition for such condemnation dismissed October 9, 1891. The facts are stated in the opinion.

Thomas R. Sherwood and *Osborn & Mills*, for petitioner, and respondent in *certiorari*.

Howard & Roos, for respondent, and petitioner in *certiorari*:

MCGRATH, J. This matter comes here by *certiorari*, to test the validity of certain proceedings to condemn land for cemetery purposes.

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The board of health of Portage township filed a petition in the circuit court for the county of Kalamazoo, under chapter 181, How. Stat., to condemn certain land belonging to respondent for cemetery purposes. Respondent demurred to the petition, alleging, among others, the following grounds:

1. Said petition is insufficient to confer upon said court jurisdiction of the subject-matter of said petition.
2. The statutes confer no authority upon said court to summon a jury in cases of the kind alleged and set forth in said petition.
3. It appears by said petition that said cemetery which it is proposed to enlarge is not owned by a corporation organized to establish a rural cemetery, and provide for the care and maintenance thereof.

Chapter 39, How. Stat., makes it the duty of the township board of health to provide and maintain burial grounds, but contains no provisions for the condemnation of land for cemetery purposes.

In 1869 the Legislature passed an act entitled "An act to authorize and encourage the formation of corporations to establish rural cemeteries, and provide for the care and maintenance thereof."[1] This act contained no provision for the acquirement of lands except by purchase or gift. The act provided for the formation of stock companies for the purpose of establishing and maintaining cemeteries; that the articles should contain a statement of the amount of land to be purchased, and of the amount of capital necessary to make the purchase and improve the grounds. It provided for the issue of scrip or certificates of stock to the subscribers, and that such scrip should be personal property, and transferable by the holder. It empowers the board of directors to purchase land for the use of such association; to levy assessments upon subscribers to the articles of association, not

[1] How. Stat. §§ 4763–4777.

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exceeding the amount subscribed; to dispose of the rights of burial, fix the prices thereof, make conditions in relation to burials within the cemetery grounds, and guarantee to the grantees of burial rights the care and preservation of the grounds; to establish such rules and regulations for the control and management of the grounds, and all matters and things incident thereto, as they shall deem for the best interests of the corporation; to sell any part or portion of the lands owned by such corporation, in case the same shall not be occupied or required for burial purposes, or for the uses of such cemetery; to invest the moneys received from the sale of burial rights; and to prescribe, from time to time, the interest or dividends which shall be paid to the holders of the scrip. It provides for the reservation out of the proceeds of the sale of burial rights of an amount which, in the opinion of the board of directors, shall be sufficient to create a fund which, when invested, shall produce an income sufficiently large to meet the expense of keeping the ground in good condition; and it further provides that all grants of rights of burial shall be transferable only upon compliance with such conditions as shall be prescribed by the board of directors.

In 1875 the last-named act was amended (Act No. 219, Laws of 1875) by adding 10 new sections,[1] providing that "whenever the board of directors of said corporation, the board of health of any township, or the common council, board of health, or board of trustees of any city or village, shall deem it to be desirable and necessary to enlarge the limits of any cemetery which has been or may be hereafter established," application may be made to a circuit judge for a jury to ascertain and determine the compensation to be made for the land required, and the

[1] How. Stat. §§ 4778–4787.

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necessity for using the same; and, after providing for the summoning of a jury, notice to the owners, a hearing, and a determination by said jury, the amending act provides that judgment shall be rendered by the court for the amounts found by the jury, and, upon proof of payment of such amounts, the court "shall, by an order or decree, adjudge and determine that the title in fee of such real estate shall * * * forever thereafter be vested in such board of directors, board of health;" etc.

The contention of respondent is that there is no valid statute which authorizes or permits the condemnation of private property for the enlargement of this cemetery; that the act of 1869 authorized the formation of corporations to establish rural cemeteries, and provided for the care and maintenance of rural cemeteries so established, and only such as are so established.

In my judgment, although the point is not made in the briefs, the amendment of 1875 is, as applicable to rural cemeteries established by corporations formed under the act of 1869, unconstitutional and void, as it attempts to invoke the exercise of the power of eminent domain for the condemnation of lands at the instigation of a private corporation for private uses.

Eminent domain is that sovereign power vested in the people by which they can, for any public purpose, take possession of the property of any individual, upon just compensation paid to him. 6 Amer. & Eng. Cyc. Law, 511; 2 Kent, Com. 339. It has been defined by this Court to be—

"The rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, and welfare may demand." *Trombley v. Auditor General*, 23 Mich. 471, 474.

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It was held in that case that the State had no authority, by virtue of its eminent domain, to condemn private lands for the purpose of turning them over to the United States for the erection and maintenance of light-houses; that the act which undertook to authorize the Governor to do this was unconstitutional, as appropriating property of individuals without due process of law; and that the right of eminent domain in any sovereignty exists only for its own purposes.

In *Ryerson v. Brown*, 35 Mich. 333, the Court say that, in authorizing condemnation proceedings, it is essential that the statute should require the use to be public in fact,—in other words, that it should contain provisions entitling the public to accommodations; that property can never be condemned for private improvements, except where they belong to a class that cannot usually exist without the exercise of that power, and where the public welfare requires that they shall be encouraged.

The exercise of the right of eminent domain is limited to cases in which the public have an interest. *Cody v. Rider*, 1 S. W. Rep. (Ky.), 2. It can never be just to take property, under pretence of public benefit, which is not needed by the public, however much it may advance interests in which the public have no concern. *Paul v. Detroit*, 32 Mich. 108, 119. The state has no right to take the property of one citizen, and give it to another, whether with or without compensation. 3 Washb. Real Prop. 539; Tied. Lim. § 121*b*, p. 390. As has been said, "When one man wants the property of another, the legislature will not aid him in the acquisition." *Taylor v. Porter*, 4 Hill, 147. See *Wilkinson v. Leland*, 2 Pet. 658; *Heyward v. Mayor*, 3 N. Y. 324.

It was held in *People v. Salem*, 20 Mich. 452, that a legislative act originating proceedings, by or in pursuance of which individual property was to be taken under the

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forms of taxation for the benefit of a private corporation, could not be justified as an exercise of legislative power. It was not, therefore, due process of law.

Mr. Cooley says:

"The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from the more profitable use to which the latter may devote it." Cooley, Const. Lim. (6th ed.), 654.

The use must be by the general public of the locality, and not by particular individuals. *McQuillen v. Hatton*, 42 Ohio St. 202; *Ross v. Davis*, 97 Ind. 79. A use which may be monopolized or absorbed by the few, and from which the general public may and must ultimately be excluded, is in no sense a public use. Land cannot be condemned for the purpose of enabling those instigating the proceedings to parcel it out to private individuals. Nor is a use which is not common to the public, and over which the state has surrendered that control and regulation necessary to secure such common use, a public use. The use of land for railways and turnpikes has been declared to be a public use, because it is open to all upon the payment of tolls, which are regulated by law, and the law requires such ways to be kept open for use by the public impartially.

As has been said, the question whether the use is public or private depends upon the right of the public to use the road, and to require the corporation, as a common carrier, to transport passengers or freight over the same. *Railroad Co. v. Railway Co.*, 41 Minn. 461 (43 N. W. Rep. 469); *De Camp v. Railroad Co.*, 47 N. J. Law, 47; *Phillips v. Watson*, 63 Iowa, 33; *Clarke v. Blackmar*, 47 N. Y. 156; Lewis, Em. Dom. § 166.

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It has been held that condemnation proceedings cannot be resorted to, to take lands for the construction of spur tracks which are made for the accommodation of individual shippers. *In re Railway Co.*, 108 N. Y. 375 (15 N. E. Rep. 429); *In re Railroad Co.*, 110 Id. 119 (17 N. E. Rep. 678); *Railroad Co. v. Wiltse*, 116 Ill. 449 (6 N. E. Rep. 49); *Railroad Co. v. Iron Works*, 31 W. Va. 710 (8 S. E. Rep. 453).

To justify the condemnation of lands for a private corporation, not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. In *Gilmer v. Lime Point*, 18 Cal. 229, a public use is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property, on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use. In other words, a use is private so long as the land is to remain under private ownership and control, and no right to its use, or to direct its management, is conferred upon the public. *In re Eureka Basin Co.*; 96 N. Y. 42. It is for the court to determine whether or not the use is a public one. *In re Cemetery Ass'n*, 66 N. Y. 569 (23 Amer. Rep. 86); *In re Railroad Co.*, 77 Id. 248; *Savannah v. Hancock*, 91 Mo. 54 (3 S. W. Rep. 215); *Railroad Co. v. Iron Works*, 31 W. Va. 710; Tied.

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Lim. § 121*a*, p. 378; Cooley, Const. Lim. (6th ed.), 660.

This very question arose in *Cemetery Ass'n v. Beecher*, 53 Conn. 551 (5 Atl. Rep. 353), and the court say:

"The complaint alleges that the plaintiff is an association duly organized under the laws of this state for the purpose of establishing a burying ground; that it now owns one; that it desires to enlarge it; and that such enlargement is necessary and proper. There is no allegation that the land which it desires to take for such enlargement is for the public use in the sense indicated in this opinion. The demurrer, for the reason that the complaint does not set out any right in the plaintiff to acquire title to the land of the defendants otherwise than by their voluntary deed, must be sustained."

In re Cemetery Ass'n, 66 N. Y. 569, it was held that the statute authorizing rural cemetery associations to acquire land by exercising the right of eminent domain was unconstitutional and void, for the reason that the use was a private one. The court say:

"The land is to be vested in trustees, with power to divide into lots, and sell these lots to individual owners. It is difficult to see what interest the public will have in the lands or in their use. No right on the part of the public to buy lots or bury their dead there is secured. The prices at which the lots are to be sold are to be fixed by private agreement. The corporation is to be managed by trustees elected by the lot-owners. The lots, or the rights of the owners therein, are to descend as private property to the heirs of these owners; and by the act of 1874 the owners may, by leave of the courts, sell their lots, and put the proceeds in their pockets. The substantial right of enjoyment of the property is vested in the individual lot-owner; and the whole effect of the incorporation of these cemetery associations is to enable a number of private individuals to unite in purchasing property for their own use and that of their descendents as a place of burial, and to secure a permanent management of it through the instrumen-

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tality of trustees appointed by themselves, and subject to no other control, with the privilege, when they cease to use their lots as a place of burial, to sell them, and receive the proceeds for their own benefit.

"It is argued that the property is to be used as a place of burial, and that the burial of the dead is a public benefit, and, therefore, the use is public. But the answer to this argument is that the right of burial in these grounds is not vested in the public or in the public authorities, or subject to their control, but only in the individual lot-owners. If the fact that it is a benefit to the public that the dead should be buried is sufficient to make a cemetery a public use, the legislature might authorize A. to take the land of B. for a private burial place of A. and his family. The fact that this land is taken for the benefit of a number of individuals for division among themselves or their grantees, for their own use as a cemetery, makes the case no stronger than if taken for the benefit of a single individual."

Precisely the same may be said of a corporation formed under the act in question. The lands owned by it are under the absolute control and dominion of the corporation. It may sell to A., and refuse to sell to B., and by its sale to A. it excludes every other person from that parcel. Not only may it sell to A. for burial purposes, but it may sell to any other person for any purpose, if, in its judgment, the lands are not occupied or required for burial purposes.

It may be urged that the petitioner here is not a private corporation; but I think that the entire amendment must fail. The original act provided for the formation of corporations to establish rural cemeteries. An amendment is made which is intended to confer certain powers upon these corporations, and also upon other corporations and agencies not alluded to in the original act. The power sought to be conferred upon the corporations organized under the original act cannot be exercised, because not warranted by the Constitution. It

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is very clear that the only purpose had in view by the Legislature in attaching this amendment to this act was to confer this very power upon these corporations, and that the only purpose of the introduction by the amendment of these other corporations and agencies was to enable such agencies to exercise this power. Thus we have an act providing for the organization of a certain class of corporations, which is amended by conferring a power the exercise of which by the corporations so formed is prohibited by the Constitution, and, at the same time, the amendment introduces another class of corporations, which are created by virtue of other statutory provisions, for the purpose of clothing them with the very powers which cannot be exercised by the corporations formed under the original act. The amendment confers no additional powers upon the corporations created by the act, and it does not subject the other agencies introduced to any of the provisions thereof. Inapplicable to corporations formed under the act, the amendment is clearly irrelevant, and its incongruity apparent.

The petition filed in the court below must therefore be dismissed, with costs to respondent.

MORSE, LONG, and GRANT, JJ., concurred with MCGRATH, J.

CHAMPLIN, C. J., concurred in the result.

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McGLORA MANNAUSAU v. TIMOTHY WALLACE.

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Replevin—Bond—Sale—Good-faith purchaser.

1. The Michigan replevin statute expressly provides for a return of the property to the defendant if he so elect, and the bond also expressly provides for a return of the property. These provisions of the law were idle if it were the intention to give to the plaintiff the absolute right to a disposal of the property.
2. Although the property is delivered to the plaintiff, it still remains in the custody of the law, and, if a judgment for its return pass in favor of the defendant, he may recover it by execution if found within the jurisdiction of the court, and, if not, by replevin, and it is immaterial whether the defendant purchased it in good faith or not.

   So *held*, where a plaintiff, who had replevied property in justice's court, sold it in another county, and on the refusal of the defendant to deliver the property to the defendant, who had recovered a judgment for its return, he brought replevin to recover possession.
3. The language used in *Cary v. Hewitt*, 26 Mich. 236, must be construed in reference to the facts, which were entirely different from those in this case, and the statement that the bond "in a special sense" becomes a substitute for the goods is very far from saying that the title had passed to the plaintiff.

Error to Washtenaw. (Kinne, J.) Argued June 19, 1891. Decided October 9, 1891.

Replevin. Defendant brings error. Affirmed. The facts are stated in the opinion.

Sawyer & Knowlton, for appellant, contended:

1. Under the replevin laws of this State, the plaintiff, after giving his bond, holds the property under a general power of disposal, and a purchaser from him acquires a good title, even though he knows of the pendency of the replevin suit; citing *Cary v. Hewitt*, 26 Mich. 236; *Gordon v. Jenney*, 16 Mass. 465; *Stevens v. Tuite*, 104 Id. 333; *Acker v. White*, 25 Wend. 614;

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Case v. Woleben, 52 Iowa, 389; *Rockey v. Burkhalter*, 68 Penn. St. 221; *Burkle v. Luce*, 6 Hill, 558; Wells, Repl. § 470.

Lehman Bros. & Cavanaugh, for plaintiff, contended:

1. On the giving of a bond by a plaintiff in replevin, the property is placed in his possession; his custody is the custody of the sheriff; the property is not withdrawn from the custody of the law. In the hands of a claimant under bonds to the sheriff for its delivery, it is as far from the reach of other process as it would have been if in the hands of the officer; citing *Hagan v. Lucas*, 10 Peters, 400; *Rives v. Wilborne*, 6 Ala. 46; *Lockwood v. Perry*, 9 Metc. 440; *White v. Dolliver*, 113 Mass. 402; *Burkle v. Luce*, 1 N. Y. 163; *Hunt v. Robinson*, 11 Cal. 272; *Goodheart v. Bowen*, 2 Bradw. 578; *Lovett v. Burkhardt*, 44 Penn. St. 174; *Speer v. Skinner*, 35 Ill. 282, 290; *Bruner v. Dyball*, 42 Id. 34.

GRANT, J. Replevin for a horse.

In 1888, one Samuel Mannausau brought an action of replevin for this same horse, in a justice's court in the county of Wayne, against the plaintiff in this case. In the former suit judgment was rendered for the defendant, who took judgment for the return of the property. Samuel Mannausau, upon the delivery of the property to him by the officer, took it to the county of Washtenaw, and sold it to the defendant. McGlora Mannausau, being unable to obtain the property under an execution in Wayne county, went to the defendant in Washtenaw county, made a demand of defendant for its possession, and, upon his refusal, brought this action of replevin. Verdict and judgment went for the plaintiff.

Samuel Mannausau did not, by his action of replevin, obtain the title to the property. The Michigan replevin statute expressly provides for a return of the property to the defendant if he so elect. The bond also expressly provides for a return of the property. These provisions of the law were idle if it were the intention to give to the plaintiff the absolute right to a disposal of the property. Although the property is delivered to the

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plaintiff, still it remains in the custody of the law, and, if judgment be for the defendant, he may recover it by execution if found within the jurisdiction of the defendant; if not, then by replevin. If a person has no title, he cannot obtain one by suing out a writ of replevin, and, having no title, he cannot convey one. It is immaterial, therefore, whether the defendant purchased in good faith or not. Possession is no more conclusive evidence of title in such case than in any other.

Cary v. Hewitt, 26 Mich. 236, is not decisive in favor of the defendant. The question was not directly involved, and the facts in that case were entirely different from those in the present case. The language there used must be construed in reference to the facts. The Court there hold that the bond "in a *special sense*" becomes a substitute for the goods. This is very far from saying that the title had passed.

Judgment affirmed, with costs.

The other Justices concurred.

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JACOB KUHN v. HERMAN FREUND.

Assault and battery—Evidence—Pleading—Damages.

1. The judgment of a crowd is not generally so accurate that evidence of its clamor can be admitted, unless the crowd and the party sought to be charged were acting in concert.
2. A witness of an assault cannot testify to his own conclusions, or to those of other on-lookers, or to the effect upon his mind of the assault, or to what "the people there desired," or that "threats of personal violence" were made by others against the assailant.

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3. Epilepsy, irritation of the spinal cord, a depression of the inner table of the skull, and permanent mental disorder, cannot be said to be the ordinary results of an ordinary assault and battery, and unless specially alleged cannot be proved.

Error to Wayne. (Hosmer, J.) Argued June 19, 1891. Decided October 9, 1891.

Case. Defendant brings error. Reversed. The facts are stated in the opinion.

John Miner (*Edwin F. Conely*, of counsel), for appellant.

Edwin Henderson and *James H. Pound*, for plaintiff.

McGRATH, J. This is case for assault and battery. The declaration contains three counts. The first alleges that defendant made an assault upon the said plaintiff, to wit,—

"At the city of Detroit, in the county of Wayne, aforesaid, and then and there laid hold of the said plaintiff, and with great force and violence pulled and dragged about him, the said plaintiff, and then and there gave and struck the said plaintiff a great many violent blows and strokes, and then and there choked the said plaintiff, * * * whereby he, the said plaintiff, was not only then and there greatly hurt, bruised, and wounded, but was also thereby then and there greatly exposed and injured in his credit and circumstances."

The second count was abandoned. The third count is as follows:

"And, also, for that the said defendant on, to wit, the day and year aforesaid, with force and arms, etc., made another assault upon the said plaintiff, to wit, at the city of Detroit, aforesaid, and then and there again beat, bruised, wounded, and ill-treated him, insomuch that his life was then and there greatly despaired of, and thereby then and there the said plaintiff was forced to lay out and expend, and will in the future be necessarily forced

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to lay out and expend, large sums of money in and about the curing himself of the several wounds, lameness, and disorders (which plaintiff avers were thereby, by the said defendant, then and there inflicted upon him, the said plaintiff), for medicines, nursing, and medical attendance, to wit, the sum of one thousand dollars, and other wrongs to the said plaintiff then and there did, against the peace and dignity of the people of this State, and to the damage of plaintiff of fifteen thousand dollars; and therefore he brings suit."

The plaintiff is 13 years of age. Defendant was informed that plaintiff had stolen some small articles from a notion stand in front of defendant's place of business, whereupon defendant, in company with his informant, started out in pursuit of plaintiff, and caught him about a block away, and the plaintiff's testimony tended to show that plaintiff was caught by the throat, thrown down, kneeled upon, beaten, and bruised by defendant. Plaintiff testified that—

"After he [defendant] had hold of me he brought me over to the policeman, and he told the policeman to arrest me, and these men that were there [the by-standers], they told him not to arrest me, but to arrest him."

Objection was made to this testimony, but counsel for plaintiff continued:

"*Q.* You said some other men spoke to the policeman. What other men? Do you remember?

"*A.* Yes, sir; there were some of them that gave me their names that they would be witnesses. They are in here now, I guess. They says to arrest him,—to arrest Mr. Freund.

"*Q.* Mr. Freund wanted you arrested?

"*A.* Yes, sir.

"*Q.* And those people were strangers to you, were they?

"*A.* Yes, sir.

"*Q.* And they told the policeman to arrest Mr. Freund?

"*A.* Yes, sir.

"*Q.* Why did they tell the policeman—what did they

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say—what reason did they give the policeman why he should arrest Mr. Freund?

"*A.* For hitting me."

Another witness testified as follows:

"It made me very angry to see a man of the age and the strength of that man to hold a little boy the way he did there; and quite a crowd collected there; and a policeman came up, and the boy stated his story as best he could in his excited manner to the policeman, and the policeman took the name, I think, of the little boy, and let him go; and I, in company with two other gentlemen, took the little boy in charge. We went down to Judge Robinson, and we advised the little boy to utter a complaint for criminal assault. * * * * * *

"*Q.* I want to know which was the first overture,—the statement that was made to the policeman; whether it was by the outsiders,—the spectators there desiring to have Mr. Freund arrested, and then he claiming to the policeman that he ought to arrest the boy."

[Objection was then made, and exception taken, and counsel for plaintiff continued.]

"*Q.* Tell us about that as near as you may.

"*A.* I could not say as to which made the first overtures. I would not undertake to state as to that.

"*Q.* But the fact is, that both these things were contemplated, were they not?

"*A.* Both of them; yes, sir.

"*Q.* Mr. Freund desired to have the boy arrested, and the people there desired to have Mr. Freund arrested?

"*A.* Yes, sir.

"*Q.* What did they want Mr. Freund arrested for?

"*A.* For abusing the boy. * * * * *

"*Q.* Did you speak to Mr. Freund at that time at all, to ask why he was doing this, or whether any protest, or what did you say?

"*A.* I entered a protest; yes, sir.

"*Q.* What did you tell him?

"*A.* I told him he ought to be ashamed of himself, and if he would strike a boy like that of mine I would break his neck.

"*Q.* What reply, if anything, did Mr. Freund make to that?

"*A.* I could not tell you. I don't remember.

"*Q.* State what the fact was,—whether the people in

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the vicinity—whether there was quite a crowd congregated?

"*A.* Yes, sir; there was quite a crowd congregated.

"*Q.* State whether there were threats of personal violence to Mr. Freund engaged in, right in his hearing?

"*A.* They were; yes, sir."

This testimony was clearly inadmissible and prejudicial. The last witness was permitted to give not only his own opinion and conclusion, but also the opinions and conclusions of other by-standers, who were not sworn, and whose identity was not disclosed. Neither his own conclusions nor those of the other on-lookers were material. Nor was it competent to allow the witness to testify as to the effect upon his own mind of the assault, or what "the people there desired," or that "threats of personal violence" were made by others. The judgment of a crowd is not generally so accurate that evidence of its clamor can be admitted, unless the crowd and the party sought to be charged are acting in concert. It was entirely proper to show by those present what was said or done by either party during the scuffle, but it was clearly improper to admit the comments volunteered by the by-standers, expressive of their partisanship. The opinion of the crowd cannot be substituted for that of the jury. See *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 99, 107. For this error the judgment must be reversed.

The point is here made that proofs that the injuries received had been followed by epilepsy, which would, in all probability, be chronic or permanent, were not admissible under the declaration, but the testimony was admitted without objection on that ground, and for the purposes of that trial the point must be deemed to have been waived. *Merkle v. Bennington*, 68 Mich. 133. Inasmuch as a new trial will be had, it is proper to say that

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under objection properly made, such proofs were not admissible. The object of a special count is to apprise the defendant of what he must be prepared to meet. Neither count of the declaration contains a suggestion of epileptic results or permanent injuries. Indeed, the third count indicates that the "wounds, lameness, and disorders" resulting are curable. Epilepsy, irritation of the spinal cord, a depression of the inner table of the skull, and permanent mental disorder, cannot be said to be the ordinary results of an assault and battery, such as is set forth in the declaration here. Damages which are peculiar to the case, and spring from exceptional circumstances, must be specially alleged, or they cannot be recovered. *Brink v. Freoff*, 44 Mich. 69, 72. The declaration here gives no notice of any such claim as is made by the proofs.

It is urged, however, that the defendant requested the court to charge that "the plaintiff is not, under the pleadings in this case, entitled to recover," and the court refused so to instruct the jury. The court was right. The objection now made to the declaration goes to the extent of the recovery only. Defendant requested the court to instruct the jury as follows:

"That if the jury find that the epileptic characteristics alleged to exist are due to any other cause than the injury alleged, and that the defendant at the time of the injury was employing no more force than, on the whole, was reasonable and necessary, the plaintiff cannot recover"

This request, in the absence of any specific objection to the declaration on the ground now stated, practically conceded that, if epileptic characteristics were due to the assault and battery alleged, plaintiff could recover therefor under the declaration and proofs, and that it was

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entirely proper for the jury to determine the question. *Brzezinski v. Tierney*, 22 Atl. Rep. (Conn.) 486.

Judgment is reversed, and a new trial ordered, with costs to defendant.

The other Justices concurred.

ALBERT D. HOPPIN v. FRED E. AVERY.

[See 70 Mich. 266; 79 Id. 434.]

Replevin—Res judicata—Good-faith purchaser.

1. A purchaser from the defendant in a replevin suit, to whom the property has been returned by virtue of a judgment in his favor for such return, is bound by a *final* judgment in favor of the plaintiff.

   So *held*, where two chattel mortgages were delivered to an agent for foreclosure, to whom the mortgagor surrendered the property, and then repossessed himself of it. The agent replevied it in his own name, and completed the foreclosure by a sale of the property to the mortgagee, after which the mortgagor recovered a judgment for its return, which was complied with. The mortgagor then sold the property to a third person, who was sued by the mortgagee in trover *after* the agent had recovered a *final* judgment in the replevin suit determining the validity of the chattel mortgages, and the vendee sought to retry said question, which he is held estopped from doing by said judgment.

2. Possession is not conclusive evidence of title, and an unauthorized sale of personal property does not prejudice the owner, unless he has done some act which is calculated to mislead the purchaser. The mortgagor had no title when he sold the property, and it is immaterial whether his vendee purchased in good faith or not. His only remedy is against the mortgagor under the implied warranty of title which accompanies a sale of personal property.[1]

[1] See *Mannausau v. Wallace*, *ante*, 543.

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Error to Van Buren. (Buck, J.) Submitted on briefs June 19, 1891. Decided October 9, 1891.

Trover. Defendant brings error. Affirmed. The facts are stated in the opinion.

Osborn & Mills and *E. R. Annable*, for appellant, contended:

1. The decision in *Eldridge v. Sherman* was not *res judicata* as to the validity of the mortgage, its consideration, and the existence of any indebtedness as between Sherman and Hoppin. While defendant was a purchaser during the pendency of said suit, his purchase was made while Sherman was in possession of the property under the first judgment, and, though the case was then pending in the appellate court, no bond staying proceedings had been filed, and the mortgage was, so far as the official record in the town clerk's office showed, of no force, not having been legally renewed; and Avery had heard Hoppin tell Sherman, in 1886, that certain money, which he then saw paid to Hoppin, 'paid up the last indebtedness between them. Defendant paid full value for the horse, and was a good-faith purchaser, both in fact and in law; and there is no good reason why, upon the reversal of the judgment in favor of Sherman after defendant's purchase, he should occupy any less favorable position than he would had he purchased the property at an execution sale, made under the authority of a judgment which was subsequently reversed; citing Freem. Ex. §§ 345, 346.
2. Two issues were submitted to the jury in the replevin suit, who found a general verdict, and it was not shown and could not be told upon which issue the case was decided. If upon the first issue, then the validity and consideration of the mortgage was not determined, but only the right of Eldridge to the possession of the property when he replevied it; citing *Depoe v. Jamison*, 33 Mich. 94.
3. Neither Hoppin nor Avery was a party to the replevin suit, and neither had the right to control its management, or take an appeal from the judgment rendered; citing *Hale v. Chandler*, 3 Mich. 531.
4. A stranger to the record may subject himself to be concluded by the result of the suit if he openly and actively, and in respect to some interest of his own, assumes its defense; but, to accomplish this result, Hoppin must have defended avowedly, and with notice to Sherman, and not upon a secret under-

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standing, and his interposition must have been so complete as practically to substitute him for Eldridge in the management and control of the case. The employment of attorneys who appeared for Eldridge, testifying as a witness, being present and aiding in the conduct of the trial, and lending assistance in money or services to him, or joining in an appeal, would not alone be sufficient to make Hoppin a party to the judgment; citing 2 Black, Judg. § 540, note 173; *Lownsdale v. Portland*, 1 Oreg. 381.

5. If Hoppin was not bound by the judgment, Avery certainly would not be; and if Hoppin *was* bound, it is not then clear that Avery would also be bound. He was not a privy, so far as Eldridge was concerned. Avery was a purchaser *pendente lite*, but not such a purchaser during any litigation involving anything by which he or those through whom he claimed could be bound, and he had no actual knowledge of the pendency of the suit; citing *Sampson v. Ohleyer*, 22 Cal. 200.

6. The doctrine of *res judicata* operates by way of estoppel. Estoppels must be mutual, and a party will not be concluded as against his contention by a former judgment unless he could have used it as a protection or as a foundation of a claim had the judgment been the other way; and, conversely, no person can claim the benefit of a judgment as an estoppel unless he would have been prejudiced by a contrary decision of the case; citing *Nowak v. Knight*, 44 Minn. 241; *Densmore v. Tomer*, 14 Neb. 392; *Moore v. Albany*, 98 N. Y. 396.

7. Eldridge was merely the agent of Hoppin, and Hoppin could not be concluded by the judgment; citing *McKay v. Kilburn*, 42 Mich. 616; *Warner v. Comstock*, 55 Id. 615; *Wyman v. Bowman*, 71 Me. 121; *White v. Dolliver*, 113 Mass. 400; *Phillips v. Moir*, 69 Ill. 155; *Alexander v. Taylor*, 4 Denio, 302; *Hunt v. Haven*, 52 N. H. 162; *Pico v. Webster*, 12 Cal. 140; Big. Estop. 119.

8. Plaintiff had the burden of showing upon which of the issues the verdict of the jury in the replevin suit was based; citing *Russell v. Place*, 94 U. S. 606; *Sawyer v. Woodbury*, 7 Gray, 499; *Chrisman v. Harman*, 29 Grat. 494; and, in any event, he assumed the affirmative by endeavoring to trace his right of recovery through the judgment in that case; and the question was one of fact for the jury, because its solution would depend upon the weight of evidence, as the estoppel did not appear upon the record itself; citing *Amsden v. Railroad Co.*, 32 Iowa, 288; *Bitzer v. Killinger*, 46 Penn. St. 44; *Tutt v. Price*, 7 Mo. App. 194; and, as no evidence was adduced upon this question, the court erred in holding the judgment *res*

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judicata; citing *Russell v. Place*, 94 U. S. 606; *Wilson v. Deen*, 121 Id. 525; *Packet Co. v. Sickles*, 5 Wall. 580; *Dunlap v. Glidden*, 34 Me. 519; *Rogers v. Libbey*, 35 Id. 200; *King v. Chase*, 15 N. H. 9; *Aiken v. Peck*, 22 Vt. 255; *Post v. Smilie*, 48 Id. 185; *Supples v. Cannon*, 44 Conn. 424; *Snider v. Croy*, 2 Johns. 227; *Tams v. Lewis*, 42 Penn. St. 420; *Follansbee v. Walker*, 74 Id. 306; *Barger v. Hobbs*, 68 Ill. 592; *Amsden v. Railroad Co.*, 32 Iowa, 288; *Sweet v. Maupin*, 65 Mo. 65; *Driscoll v. Damp*, 16 Wis. 106; *Hickerson v. City of Mexico*, 58 Mo. 61; *Clark v. Blair*, 14 Fed. Rep. 812; *McDowell v. Langdon*, 3 Gray, 513; *Burlen v. Shannon*, 99 Mass. 200; *Lea v. Lea*, Id. 493; *Hooker v. Hubbard*, 102 Id. 239; *Hood v. Hood*, 110 Id. 463.

Crane & Breck, for plaintiff, contended:

1. Hoppin was privy to Eldridge in the replevin suit, and that case is *res judicata*; citing *Finney v. Boyd*, 26 Wis. 367; *Driscoll v. Damp*, 16 Id. 110; *Wales v. Lyon*, 2 Mich. 276; *Prentiss v. Holbrook*, Id. 372; *Tucker v. Rohrback*, 13 Id. 74; *Barker v. Cleveland*, 19 Id. 235; *Lansing v. Sherman*, 30 Id. 52; *Fifield v. Edwards*, 39 Id. 264.
2. Evidence is always admissible to show what matters arose and were determined in a prior suit, and the record may even be explained; citing *Briggs v. Wells*, 12 Barb. 567; *Harris v. Harris*, 36 Id. 88; *Driscoll v. Damp*, 16 Wis. 110; *Easton v. Bratton*, 13 Tex. 30; *Packet Co. v. Sickles*, 5 Wall. 580; *Smith v. Talbot*, 11 Ark. 666; *Chamberlain v. Gaillard*, 26 Ala. 504; *Lawrence v. Hunt*, 10 Wend. 80; *Gardner v. Buckbee*, 3 Cow. 120; *Eastman v. Cooper*, 15 Pick. 276.

McGRATH, J. This is trover for the conversion of a horse. Plaintiff had judgment, and defendant appeals.

In March, 1886, John D. Sherman gave two chattel mortgages upon certain horses, including the one for the value of which this suit is brought,—one to plaintiff, and the other to one Sellick. Sellick assigned his mortgage to plaintiff. Plaintiff, in the fall of 1886, placed the mortgages in the hands of one Eldridge for foreclosure. Eldridge demanded the horses from Sherman, who asked for an extension of time, and was granted one day. Eldridge on the next day went for the horses, and Sherman voluntarily delivered them to Eldridge, who held

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them for five days, at the end of which time Sherman took the horses from the barn where they were put by Eldridge. Eldridge afterwards made a demand upon Sherman for the horses, but Sherman refused to give them up. Eldridge then brought replevin in his own name, and secured the horses, and sold them in March, 1887, to plaintiff.[1] Upon the trial of the replevin suit in September, 1887, Sherman had judgment for the return of the property, on the ground that Eldridge was simply the agent and servant of the plaintiff here, and as such was not entitled to maintain that suit in his own name. The sheriff took the horses from Hoppin, and returned them to Sherman. Eldridge appealed to this Court, and that judgment was reversed, and a new trial ordered. *Eldridge v. Sherman*, 70 Mich. 266. Before a retrial was had, to wit, in April, 1888, Sherman sold the horse in question to defendant here. In January, 1889, a retrial of the replevin suit was had, and Eldridge had judgment. Sherman appealed to this Court, and that judgment was affirmed. 79 Mich. 484.

Plaintiff brings trover for the value of the horse purchased by the defendant from Sherman. Plaintiff put in evidence the two mortgages in question; a certificate or claim filed with the township clerk, dated August 25, 1886, wherein plaintiff claimed that there was due on the mortgage given to him the sum of $400; three affidavits of renewal, filed, respectively, March 7, 1887, March 9, 1888, and March 11, 1889; the files, records, charge of the court, and judgment entry in the case of *Eldridge v. Sherman;* and it was conceded that in the last trial of *Eldridge v. Sherman* the whole question of the validity of plaintiff's mortgage was fully gone into upon both sides, as well as whether the property was or

[1] This sale was made by virtue of the mortgages, and in completion of their foreclosure.

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was not voluntarily turned out to Eldridge by Sherman, and these questions were submitted to the jury as questions of fact under the charge of the court.

Defendant objected to the admission of the files and judgment in the case of *Eldridge v. Sherman*, and sought to assail the validity of the mortgage given to plaintiff; but the court held that the decision in that case was conclusive upon that question. We think that the court was correct in this determination. Although defendant here was not a party to that suit, his vendor was, and the vendee could not be permitted to retry the issue which had been disposed of adversely to his vendor in that litigation. Any other rule would involve the parties in endless litigation, for, in order to secure a retrial of the same issue, it would only be necessary to transfer the property.

But it is insisted that plaintiff here was not a party to that suit. It must be conceded, however, that he was the real party in interest. Indeed, the fact appears in the suit that Eldridge claimed as an officer who had taken the property for Hoppin under a mortgage running to him, and the validity of this mortgage was assailed in that suit. There is no question but that a final judgment in that suit in favor of Sherman would have concluded plaintiff here. The issue there involved more than the right of possession. The validity of the mortgage had in fact been tried and determined by the judgment. A final judgment is binding not only upon the parties, but upon their privies.

It is argued, however, that although the question of the validity of the mortgage was raised and gone into in that suit, yet another and distinct issue was submitted to the jury, involving the right of possession only, and, as the verdict was general, it is impossible to say upon which proposition the jury based their verdict. This

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argument proceeds upon a narrow view of the determination of this Court in the case of *Eldridge v. Sherman*, already referred to. In the first (70 Mich. 270) Mr. Justice LONG says:

"The right of possession was in Eldridge, not only by the authority from Hoppin, but by the voluntary surrender of the property by the defendant, the mortgagor; and the defendant had no right, after such voluntary surrender of the mortgaged property, and after the plaintiff had been put to the expense of the keeping, to take the property away without first paying, or tendering payment of, the mortgage debt and interest, and such expenses."

What the Court in effect say is that, after the voluntary surrender of the horses to Eldridge, Sherman was estopped from setting up the invalidity of the mortgage. Hence the same result was reached upon whichever question the jury passed. If they found that the property had been voluntarily delivered over to Eldridge, then Sherman was estopped from questioning the validity of the mortgage. If they found that there was not a voluntary delivery, then upon the merits they found the mortgage to be a valid one. In either case the question of the validity of the mortgage was passed upon.

Objection is made to the admission of the testimony of plaintiff as to what matters were in issue in the replevin suit; but the files and records were afterwards introduced, and the same facts were conceded.

Defendant offered to show that in June, 1886, Hoppin, Sherman, and Avery met, and that at that meeting Sherman made a payment to Mr. Hoppin, and Hoppin then and there stated that the sum so paid over paid the last of the debt covered by this mortgage, to show that there was nothing due upon this mortgage in any event, assuming that it was a valid mortgage. The testimony was excluded, and we think properly. If it was

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true that the debt secured by this mortgage was paid, it would have been a good defense in the replevin suit. The right to foreclosure depended upon the existence and non-payment of the debt. As was said in *Fifield v. Edwards*, 39 Mich. 264, 266:

"It cannot be suffered that a controversy shall be tried over and over, but the one suit tried, submitted, and disposed of on the merits must conclude the litigation. If a party has been so negligent or so unfortunate as to fail in making a full presentation of his case, whereby the judgment was passed against him, he cannot be helped on making a better showing in a new suit. The estoppel does not depend upon the question whether justice was done in the first suit, but upon the merits having once been considered and passed upon."

It is not claimed that this statement misled Avery, or that in his purchase he relied upon the information thus obtained. His purchase was made nearly two years afterwards. In the mean time the filing of the mortgage had been kept alive in the office of the township clerk by renewals, one of which was filed within a month prior to his purchase.

In offering the files of the replevin suit, plaintiff's counsel, under objection, excepted the order for the return of the property after verdict at the conclusion of the first trial. That judgment had been reversed, and was without force or effect. The case had been appealed to this Court when Avery purchased. If he had notice of the judgment, he had notice of the appeal, or that the judgment was not final.

Possession is not conclusive evidence of title. An unauthorized sale of personal property does not prejudice the owner, unless he has done some act which is calculated to mislead the purchaser. Sherman had no title when he sold to Avery, and it is immaterial whether the latter purchased in good faith or not. His only remedy

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is against Sherman under the implied warranty of title which accompanies a sale of personal property.

There is no error in the record, and the judgment is affirmed, with costs.

The other Justices concurred.

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ZENUS SWEET, ADMINISTRATOR, ETC., v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Master and servant—Railroad companies—Assumption of risks—Contributory negligence—Trial—Conduct of counsel.

1. Constructing and maintaining a side track so near to a building in the yards of a railroad company, and under its control, as to endanger the lives of its employés while switching cars on said track, is a violation of the duty of the company to provide a safe place for its employés to work in.
2. Where in such a case an employé is killed by being crushed between the car upon which he was braking and the building, and the testimony fails to show that he had ever before switched a car on said side track or past the building, or that he had any reason to apprehend the existence of such *special* danger, it is a question for the jury, under all of the testimony, to determine whether he knew or ought to have known of such danger.
3. It is not proper for counsel upon either side to attempt to play either upon the pride or prejudices of the jury; but where the attorney for the losing party is the aggressor in matters of this kind, thereby challenging a reply from his opponent, the Court is not called upon to punish the latter's client for an indiscretion of his counsel thus called out in the heated trial of an important cause, unless it appears quite plainly that the verdict was influenced thereby.

Error to Washtenaw. (Kinne, J.) Argued July 1, 1891. Decided October 9, 1891.

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Negligence case. Defendant brings error. Affirmed. The facts are stated in the opinion.

Henry Russel (*H. M. Campbell*, of counsel), for appellant.

Sawyer & Knowlton, for plaintiff.

MORSE, J. This is an action for damages based on the negligent killing of plaintiff's intestate. The plaintiff had verdict and judgment for $5,000. The facts are substantially as follows:

A part of defendant's station yards or grounds at Detroit is called the "Bay City Yard," in which is a side track called the "Bentley Siding." On this track stands a long, low, irregular building, called "Bentley's Oil Works," or "Sheds." This side track is constructed and used for the Bentley oil works, and nothing else. It is 47 feet from the switch to the south end of the building. The length of a car is 34 feet. The track upon which this building is located runs somewhat in a circle, but its general course is north and south. The switch is south or south-west of the building. The oil shed or building stands on the easterly or northerly side, and the main track is on the west side of the Bentley side track. The top of a car is higher than the roof of this shed or building. The building is constructed in sections. The second section cannot be seen from the south end, when standing at the switch. It sets back a foot or two from the other portion of the building. The office of the building is in that jog. Passing that, there is another building at the end of it. The south end of this building, or tank, or shed, is not perpendicular. The space between the side of the car while passing and the building is 16 inches at the south end, and, as the car goes north, it grows smaller, until the

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end of the first section of the house is reached, when the space closes up to 13 inches. This is occasioned partly by the building righting up, and becoming nearer perpendicular at the north end than it is at the south end. At the south end of the building there are double doors, both swinging out. At the time of the accident these doors seem to have been open, thus acting as the lips of a funnel, and might have presented a very deceiving appearance. The doors are over five feet wide, and, when open, leave only a space of 42 feet from the switch to the entrance of the funnel. This building had been standing there for five years, and was wholly upon the grounds of the defendant.

Plaintiff's intestate was 26 years old at the time of his death. He was married, and left surviving him one child, a daughter three years old, and his widow, Louise Sweet. He was a saving, prudent man, and was receiving $60 a month at the time of his death. He had been in the employ of the defendant for some time as brakeman on the eastern division of the main line, from Jackson to Detroit. While on that division he received an injury. After his injury he went into the employ of the defendant again as switchman in its yards at Detroit, and was in the employ of the defendant in that capacity a month or six weeks before the accident.

The switching team of which Sweet was a member was composed of Frasier, Maroney, and Sweet. Their duties as a switching team extended to any part of the company's yards at Detroit, but their chief labors seem to have been expended in that portion of the defendant's yards called the "Bay City Yards." There is no direct evidence that Sweet was ever on the Bentley siding before the accident. There is no evidence that his attention had ever been called to the dangerous proximity of the build-

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ing, but there was evidence tending to show that cars were probably shipped in there from once to twice a day. There is no claim that he was ever informed by any one that the place was dangerous, or of the location of the shed, as connected with the railroad track.

The manner of the accident was as follows: The switching team came down from Bay City Junction on the main track, with two cars attached to the engine, and backed in on the Bentley siding, and coupled on to a car, and then pulled back over the switch and onto the main track. Sweet stood at the switch, and, as the train pulled out from the switch, threw it back onto the main line. The engine then pushed the car that had been taken from the siding down the main line, past the switch. Maroney rode that car down the main line, and stopped it. The engine then pulled up beyond the switch again on the main line, and Sweet threw the switch back to the Bentley siding, and stood at the switch. The engineer then pushed a stock-car for the siding. Frasier cut off the car, and the engineer pushed it down the track onto the Bentley siding, following it with the engine; and, as the north end of the car passed the switch, Sweet got onto it. He was then upon the east side of it, next the building. When Sweet got onto the north end of the car, naturally he was looking south, towards the approaching car as it came to the switch, and when he got onto it his face would be away from the building. Frasier was on the south end. Seeing Sweet get on, he (Frasier) dropped off at the switch. The car thus cut off was a Michigan Central combination stock-car. These cars are slatted lengthwise. The posts, or studs, upon which the slats are nailed, are on the outside of the car. There are two ladders to this car, placed upon opposite sides, near the opposite ends of the

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car. In order to stop the car it was necessary to reach the top of it by these ladders. These cars are more difficult to mount than an ordinary box-car, for the reason that the slats are left apart, and, unless special attention is paid, the foot is liable to strike through the holes in the side of the car, and slip off the rounds of the ladder, and it therefore draws a person's attention more closely when mounting than it would on a box-car.

In the division of the work, it is the practice for the switchman who throws the switch to mount the car that is kicked on the siding as it passes him, set the brakes, and stop it at the place desired, and for the switchman who cuts off the car to drop off at the switch, and throw it back to the main line; and this seems to have been attempted in this case. At this time Frasier cut off this car, rode it down to the switch, and, looking through the slats of the car, saw Sweet mount upon the other side. Frasier then dropped off at the switch, to throw it back upon the main line. The engine was pushing the car, and the fireman did not know it was cut off. It was Sweet's duty to get on, and Frasier's duty to get off, at the switch, in the manner it was done; and, according to the custom of doing the work, it was the duty of one of them to get on the car at any event. There was testimony tending to show that generally, in handling cars upon this side track, the men work upon the side of the cars away from the building.

The car was 34 feet long. It was only 47 feet from the switch to the building, and the doors, being open, reduced that distance five feet. From the switch to the funnel, therefore, was only 42 feet. This car was going as fast as a man could walk. Sweet, therefore, only had the time it would take a man to walk 42 feet, from the time he attempted to mount the car until he was crushed. As he attempted to mount the car he took hold of one

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of the rounds of the ladder, and put either his foot or his knee upon the step of the car,—that is, the bottom step under the car,—and looked towards the car. He had only straightened up by the side of the car when the fireman, seeing his danger, hallooed to him to look out for the shed. He heard the noise, but did not comprehend what he said. He looked up, and smiled to the fireman, as though he thought he was joking, and in an instant was between the car and the shed, and was rolled the distance of the first section of the oil-shed between the car and the shed, and when he reached the end of that section he dropped down to the ground, and striking upon his feet, with his back against the shed, stood in that position, while the engine stopped, and the fireman got down and started to go to him, but before he got to him he fell back upon the ground, striking his head against the rail. They picked him up, and carried him into Bentley's oil works, and laid him on the floor He lived about 30 minutes, and said to Frasier, "Take me home to my wife."

The negligence of the defendant is apparent, and does not seem to be disputed. It was the duty of the defendant to provide a safe place for the men to work in the yards. There is shown no excuse for the laying of this track so close to the building. It was unsafe and dangerous. Indeed, the claim made by defendant's counsel is that it was so obviously unsafe that the plaintiff's intestate was presumed, as a matter of law, to have taken notice of it. The building was on defendant's premises and under its control, and its tracks, at least, could have been changed to prevent the accident.

The principal error assigned against the verdict is that the plaintiff's intestate was guilty of contributory negligence as a matter of law, because, by reasonable observation, he might have known of the danger incident to the

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situation, and therefore he assumed the risk, and no recovery can be had.

The court instructed the jury upon this question as follows:

"Now, gentlemen, in order for the plaintiff to recover in this case he must satisfy you, by a fair preponderance of evidence, of several things:

"1. That the decedent, John H. Sweet, was not guilty of contributory negligence; for, if the want of ordinary care and prudence on the part of Mr. Sweet in any degree contributed to this accident, plaintiff cannot recover. In other words, if the decedent, Mr. Sweet, by the exercise of due care and ordinary caution, could have avoided this injury, he cannot recover.

"2. If, from the evidence in this case, you find that the decedent was not guilty of contributory negligence, as I have defined it to you, then, before the plaintiff can recover, you must also find, and you must be further satisfied by a fair preponderance of evidence, that the defendant corporation was itself guilty of negligence; that is, that it has been guilty of a neglect of that care, caution, and prudence which good railroading requires.

"3. When Mr. Sweet entered the employment of the railroad company, he assumed the risks and perils usually incident to such employment, and included in such risks and perils were those which it was his duty to take notice of by observation. All the perils, chances, and risks which were apparent, obvious, and open to observation, these Mr. Sweet assumed; and, if this accident resulted from this risk, there can be no recovery. The defendant corporation had a right to rest upon the probability that Mr. Sweet would know what was generally to be seen by his own observation,—his sight.

"On the other hand, gentlemen, Mr. Sweet had a right to assume that the railroad company had done its duty, and placed its tracks in such a condition as good railroading would demand, and so that he could perform his duty with reasonable safety, and he did not assume any such unusual or extraordinary risks as, without fault on his part, he might be exposed to through the negligence of the defendant; and if, in the discharge of his duties, the decedent, Mr. Sweet, was exposed to such dangers and perils as are unusual, exceptional, and not

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fairly incident to good railroading, and such perils as one in the faithful discharge of his duties could not ordinarily be expected to foresee, then it was the duty of the railroad company to have apprised him of such danger and perils; and if they neglected such duty, and decedent himself was unconscious of the danger, and, while exercising due care and caution, failed to observe the danger and peril, then these facts would be circumstances in this case which you may consider in determining the question whether or not the plaintiff is entitled to recover. And in determining the question whether or not the decedent, Mr. Sweet, was guilty of contributory negligence, you may consider the exigencies and all the surroundings of the situation, and therefrom conclude whether or not the decedent, Mr. Sweet, was in the exercise of that degree of care and caution which were incumbent upon a man of ordinary prudence in the same calling and under the circumstances which surrounded him at the time of this accident; and you must determine whether or not in the exercise of due care, under the circumstances of the case, he was bound to appreciate the danger that confronted him.

"If, from the evidence in this case, you are satisfied that Mr. Sweet knew of this danger, and that this accident was due to his own negligence and inadvertence, and arose from a want of ordinary caution and prudence on his part, plaintiff cannot recover. Or if you are satisfied, from the evidence in this case, that this danger was so obvious, so patent and discernible, that a man in the exercise of ordinary care and prudence would have avoided it, then the plaintiff cannot recover. If, however, you are satisfied, from the evidence in this case, that the ordinary use of this side track, with the buildings thereon so located in such proximity to it, was unsafe and dangerous; that it was improper and negligent railroad management; and you further find, under all the circumstances of this case, that the decedent, Mr. Sweet, was blameless; that he was in the exercise of due care and caution at the time of this injury; and that he did not contribute to this accident,—then the plaintiff is entitled to recover.

"I give you certain requests on the part of the plaintiff:

"'It is the duty of the defendant to provide a reasonably safe place in which to do its work, and, if the jury shall find from the

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evidence in this case that the defendant corporation failed in this respect, it was guilty of negligence. This duty of the master—that is, the railroad company—to provide a reasonably safe place in which to perform the service required of its servants, in railroad business extends to the construction of its line, and renders it liable to its servants for injuries, arising in the necessary discharge of duty, caused by the location in dangerous proximity to its line or side track of any structure over which it may rightfully exercise exclusive control,—cattle-chutes, signal posts, water-tank, piles of lumber, awnings, and buildings.

"'It is also a rule of law that when a person injured so far contributed to the injury by his want of ordinary care that, but for the want of such ordinary care on his part, the injury would not have been done, the railroad company is not liable to plaintiff in damages for such injury. But the duty of ordinary care upon the part of the person injured for his own safety is not unvarying, but is dependent upon circumstances of the particular case. The mere fact, therefore, that the deceased knew the building stood near the track, may not necessarily charge him with contributory negligence, or the assumption of the risk; but the question is, did he know, or ought he to have known in the exercise of ordinary common sense and prudence, that the risk and danger existed?'

"I give certain requests on the part of the defendant:

"'If the deceased knew that the shed of the Bentley Oil Company stood so near the side track as to render it unsafe for the employés of the railroad company to ride past it on the ladder on the side of the car, the plaintiff is not entitled to recover.

"'For about three weeks the deceased was employed almost daily in and about the side track leading to the Bentley oil-shed, and if he might have known, by the exercise of reasonable care and observation, what the danger was from the proximity of the shed to the track, he cannot recover, even though he did not know or appreciate it.

"'It was the duty of the deceased to observe and learn all that he reasonably could about the places in which he was called upon to work, and the risks and dangers connected therewith, and if his failure to do so contributed to this injury he cannot recover. If the deceased, while standing at this switch, could have told that the shed was so close to the track as to render it dangerous to ride by on the ladder, this fact you may take into consideration in determining the question whether or not the deceased was guilty of contributory negligence. It was the duty of the deceased to observe the premises where his duties were performed, and to use his eye-sight.

"'The responsibility of a railroad company to its employés for

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the condition of its road is less strict than it would be to strangers, and an accident to an employé involving no liability might, if it happened to another person, cause actionable injury.

"'Railroad employés are presumed to be aware of, and to take the risk of dangers from, such conditions and defects in the construction of the side track as would be open to observation, and they are also expected to use reasonable care in examining their surroundings.

"'While it is the duty of the defendant to furnish sufficient and safe material, machinery, and other means by which the work of the employed is to be performed, and keep the same in order and repair, and its contract implies that, in regard to these matters, the employer will make adequate provision against negligence on the part of the company, and that no danger shall ensue to him therefrom, it is well settled that the employed assumes all the risks and peril usually incident to the employment, and that included in such risks and perils are those which it is a part of the duty of the employed to take notice of by observation.

"'The plaintiff charges that the defendant is guilty of negligence because of the failure of the employés or officers of the company to assume the probability of some brakeman or switchman clinging to the side of the car next to the shed, and being injured, because there was not sufficient space to permit him to pass in safety. You are not necessarily to suppose that any one employé or officer of the defendant would be any more observant of the possibility of such danger than another. It is for you to determine whether the deceased himself, during his employment in the yard, had not as many facilities to learn the situation of the shed and track, with reference to riding through, as any other employé of the company. If the deceased had such opportunity, he was guilty of negligence which contributed to the injury, and plaintiff cannot recover.'"

We think the matter was fairly submitted to the jury.

Defendant's counsel in this case rely mainly upon the case of *Illick v. Railroad Co.*, 67 Mich. 636; but the following excerpt from the opinion in that case will show that it differs materially from the case before us:

"The space between the side of the bridge and the ladder upon the car where the brakeman was injured, as shown by the record, was two feet and three inches wide. The danger in going up the ladder at that place was before him, and was as plain to his observation as to any person connected with the train, or whose duty it was to run upon the road. It was not his duty, on the

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signal for brakes, to go up the ladder when the service was fraught with such danger. There was no special request for any person in charge of or controlling the train for him to make the perilous ascent; and, when he did so, it was at his own peril.

"The duties of his employment did not require him to go upon the box-car until he had passed the bridge. It did, however, require him to observe and take knowledge of the danger, if any, in crossing the bridge, if such knowledge could be obtained by his own observation. He had crossed the bridge 200 times before he was injured; and each time he crossed furnished him an opportunity of observing the very danger which overtook him and caused his death.

"The bridge was sound, and safe for the passage of trains, without defect, and in good repair. Whether it was 14 or 24 feet wide was a matter of no concern to the brakeman, so long as he was not required to occupy a place of danger in the discharge of his duties while passing over it, and this he was not required to do.

"A railroad company cannot be required to condemn and remove a bridge which is without fault in its plan or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive."

It will be seen that it was not the duty of Illick to go up the ladder when he did; nor was the company negligent in maintaining the bridge. He had crossed the bridge 200 times before this, and each time had opportunity to examine it, and notice the danger. Here there is no testimony that Sweet ever passed the place before, and, if he did, that he was not on top of the car, or on the opposite side, where the danger might not be discernible. It was in the performance of his duties that he was killed.

It may be assumed that he must have seen that the

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cars passed very close to the building, and it is claimed that he must have noticed that a man upon the ladder could not pass through there without getting hurt, as one witness testified that any one could see it who looked through there. But the trouble is that there is no evidence that Sweet was ever called upon to stand at the switch, or back of it, and look through there when a car was passing the building. It is not shown that he ever helped to switch a car on that track or past this building. Under such circumstances, is he to be conclusively presumed negligent in not having informed himself of the danger? I think not. Until he had some reason to apprehend the existence of this danger, not ordinarily incident to his employment, his conduct might well be influenced by the assumption that his employer had regard for its duty, and would not negligently expose him to extraordinary peril. *Robel v. Railway Co.*, 35 Minn. 84 (27 N. W. Rep. 305).

At the time of the accident he was standing with his back to the building, waiting for the appearance of the car, and, standing thus, jumped upon the car to ascend the ladder, turning his face, as he naturally would, towards the car, and having regard at that moment for his safe ascent to the top. In another moment he was caught and crushed to death.

It was a question for the jury, under all the testimony, to determine whether Sweet knew or ought to have known of this danger, and we think the charge of the court was eminently fair to the defendant.

The only other error complained of is to the remarks of Mr. Sawyer, of counsel for the plaintiff, in his closing argument. What is complained of is stated in the record as follows:

In the course of Mr. Sawyer's argument to the jury, the following language was used:

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"*Mr. Sawyer:* One word upon the subject of contributory negligence, etc. If juries go against railroads,—if they cannot be trusted in railroad cases if they are given to them,—it is because in every case the railroads are inimical to the plaintiff.

"*Mr. Whitman:* The statement is made that the Michigan Central Railroad Company is unjust and cruel and inhuman. It is not true, and I take exceptions to it.

"*Mr. Sawyer:* I said I asked of this jury the same consideration of the rules of right and law that I would ask between two men engaged in the same trouble. I say, further, that when my Brother Whitman came to close the case for the defendant he called the attention of this jury to the fact that this was a railroad case, and it was talked upon the street everywhere that, if a party could get by the court and get to a jury in a railroad case, the jury would 'whoop it up' to a railroad company. I say, in answer to that, what I have said, and repeat it: If there is one single, solitary jot or tittle in what my brother says about it, it is simply because, in cases of this character, where a husband and father has been slaughtered by the negligence, as I think, of the railroad company, or as I think the evidence in this case shows the railroad has done, if it were between man and man, the man would go to the woman and child, and say some kind word to her, and do some kind act for her; at least, would pay the funeral expenses of the man he had killed, and would not suffer her to go abroad across the land, weeping for want of a word of consolation in her heart, and would do something to settle with her, or offer to settle with her, instead of saying to her, 'Go to hell.' I say that, and I do not charge anything against these gentlemen; I know them all, and I know them well.

"*Mr. Campbell:* I desire to take exception to these last remarks, and I think I am entitled to it when he says we crushed the life out of this man, and then told the widow and child to 'go to hell.'

"*Mr. Sawyer:* If the stenographer will take the language all in its connection, I have not the slightest objection. I say the language was figurative.

"*The Court:* The stenographer will note what you say.

"*Mr. Sawyer:* We do not ask at the hands of this jury one thing that is different from what we would ask

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from a man. We do not ask any vindictive damages; we ask nothing because it is against a railroad company."

Some of the expressions used by Mr. Sawyer were decidedly improper, and if they had been used without provocation, and not in reply to a similar breach of professional decorum on the part of one of the defendant's counsel, would have been sufficient to reverse the judgment. But the counsel for the defendant was the first, as appears from the record, to introduce into the case any question as to there being any difference between it and the ordinary litigation between man and man. The remark attributed to Mr. Whitman by Mr. Sawyer must be taken, as the record stands, it not being denied, to have been uttered. Its object could only have been to influence the jury in favor of his client by giving them to understand that people outside expected they would not do their duty, but find against the railroad company, as a matter of course, if the court should give them a chance to do so. Mr. Sawyer attempted to meet it by saying, in substance, that the railroad company deserved it.

It was not proper for either of these gentlemen thus to attempt to play either upon the pride or prejudices of the jury; and that it is often done by attorneys is no excuse for so doing. But where the attorney for the losing party is the aggressor in matters of this kind, thereby challenging a reply from his opponent, I do not think the Court should punish the latter's client for an indiscretion thus called out in the heated trial of an important cause, unless it appears quite plainly that the verdict was influenced thereby. Certainly in this case there can be no claim that the damages allowed are excessive, and we are not prepared to say, nor do we think, that if Mr. Sawyer had not made these remarks the jury would have found for the defendant.

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The judgment is affirmed, with costs.

CHAMPLIN, C. J., MCGRATH and LONG, JJ., concurred with MORSE, J.

GRANT, J. *(dissenting).* I think the verdict and judgment in this case should be set aside, on account of the intemperate and unjustifiable language used by counsel for the plaintiff in his argument to the jury, which is stated in the opinion of my Brother MORSE. It is conceded to have been improper, and that its natural tendency was to greatly prejudice the jury. The remarks were duly objected and excepted to by the defendant's counsel.

Assuming that defendant's counsel in his argument to the jury used the language attributed to him in the remarks of plaintiff's counsel, I do not think that furnishes any excuse for the use of the language complained of. It does not appear that plaintiff's counsel made any objections to the improper remarks attributed by him to counsel for defendant. Counsel for one side should not be permitted to sit by and listen without objection to improper remarks from the other side, and then be permitted, under objection, to get even by going outside the record himself, and using language like that in the present case. The only orderly and proper way in such a case is for the opposing counsel to object, and ask the court to stop the use of such language. It might as well be contended that, when one counsel permits incompetent evidence to be introduced by the other side without objection, he should be permitted, under objection, to introduce other incompetent evidence; that in such case no complaint can be made. When incompetent evidence has been introduced without objection, the opposite side has, of course, the right to contradict it by other evidence; but the rule extends no further.

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Plaintiff's counsel would undoubtedly have been justified in meeting the statement of defendant's counsel by a denial, and by an argument upon the statement. But it needs no argument to show that the language used was not confined within this limit. The law should not, and in my judgment does not, sanction the practice allowed by the court in this case. It is the clear duty of trial courts to see that counsel in their arguments are confined to the record, and that no improper efforts are used to prejudice a jury.

Judgment should be reversed, and a new trial ordered.

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115 634

CHARLES C. LEE v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Master and servant—Incompetent fellow-servant—Question for jury.

1. A master is liable for injuries to servants that spring from such negligent acts of fellow-servants as are due to their incompetency; citing *Hilts v. Railway*, 55 Mich. 437; and where in a negligence case there is evidence tending to show such incompetency, the question should be submitted to the jury.
2. The following general propositions are summarized from the opinion of Mr. Justice MCGRATH:

   a—Employers may be negligent in the *selection* of servants as well as in their *retention;* citing *Hilts v. Railway*, 55 Mich. 437; *Mining Co. v. Kitts*, 42 Id. 34; *Smith v. Potter*, 46 Id. 258.

   b—In the absence of any evidence as to the exercise of care in his selection, proof that a servant who has been in the service but two or three weeks was incompetent when employed need not be supplemented by proof of the master's knowledge of his incompetency.

   c—Where a servant competent at the time of his employ-

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ment becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of such incompetency or habit must be brought home to the master, or it must be so notorious as to charge the master with knowledge; but when the incompetency existed at the time of the employment, proof of notice to the master is unnecessary.

Error to Wayne. (Gartner, J.) Argued July 2, 1891. Decided October 9, 1891.

Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Conely, Maybury & Lucking, for appellant.

Henry Russel (*Henry M. Campbell* and *Ashley Pond,* of counsel), for defendant.

McGRATH, J. Plaintiff had been employed as a brakeman for about one year. He had been at work in the yard as helper for only a month. He had had no other experience in switching. He did not know Seward, the yard-master, before the accident, except that he had seen him at work in the office. He knew nothing about Seward's experience or knowledge; said that he was incapable of giving any opinion as to that. Seward had been acting as yard-master two or three weeks before the accident.

Plaintiff was injured while assisting in making up a freight-train, at about 7:30 A. M. This train was sometimes made up by the night men, and when plaintiff came on he supposed it was made up, except the cars which he was coupling to it. He had no notice from any source that a crew was at work at the west end, or that the main part of the train would be moved. He did not know that the west part of the train was coming, and had no reason to expect that it would be moved. He was not present when the order was given by Seward

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to Barry to couple on these cars. The track was a curved track, and there were 38 cars in the train. The adjoining tracks were full of cars. Up to the time of the injury, plaintiff had never worked at one end of a train while work was being done at the other end. Employés were usually notified by the yard-master when another train or engine was expected on the same track.

Several witnesses were examined in plaintiff's behalf.

Staats had been at work for the company 11 years up to 1890. Began as foreman of a chain-gang, then worked as car inspector, then as brakeman, then as helper in the yard for two or three years, then as yard conductor, or switchman, and was extra yard-master when a vacancy occurred.

Finch is yard-master for the Grand Trunk road. Had been in the employ of defendant for 16 years immediately before 1889. Was first switchman's helper, then had charge of an engine, then switchman for several years before he became yard-master.

Wells has been railroading since 1869. Worked since 1881 for defendant. Was night yard-master in 1888, 1889, and part of 1890. Commenced as helper, was then switchman for four or five years, then became night yard-master.

McAllister was conductor of this freight-train, and had been in the employ of defendant since 1881. Was at the time of the injury engaged in checking off the cars.

Dyer had been in the employ of defendant from the fall of 1876 till March, 1890, as car-checker in the lower yard.

These witnesses all testify that they had known Seward for years before he was appointed yard-master; that Seward had been messenger, car-checker or number-taker, and train-master's clerk, and that his work had been office work only; that he had had no experience as helper, switchman, or assistant yard-master.

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Staats, Wells, and Finch testify that experience in a yard as switchman is essential to the proper performance of the duties as yard-master; that Seward was incompetent; that they based their statements as to his incompetency upon their knowledge of his inexperience, and their observation as to the way he set about doing his work; that an inexperienced man could not go to work and make up trains without great danger; that it was customary for the yard-master to notify the crews of the fact whenever men were to work at the other end of the train, or to signal them; that the movement of the body of the train would not be expected or looked for unless they were informed that such a movement was to be made; that, when there was a gap in a train, the closing of this gap would not be expected without notice; that there was a gap in this train; that plaintiff, from where he stood, could not see the engine or the front section of the train, because of the curved track, and the presence of cars on adjoining tracks.

Defendant offered no testimony as to the diligence exercised by the company in the selection of the yard-master or as to his competency for the position.

Seward was personally directing the movements of the engine at the west end of the train. It was shown that, when he ordered Barry to put the cars on at the east end, he did not notify him of his intention to move the train from the west end. He gave no warning or signal to any one.

Barry testified that he was ordered by Seward to take the two cars, and put them on the east end, but that Seward did not notify him that he (Seward) intended to operate at the west end, or move the body of the train. On cross-examination, Barry said that he had been up at the west end that morning; that he knew there was an

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engine there; that, as he moved towards the east end of the train, he could not see the engine at the west end, but he saw the whole train move from the west end, and he stopped his engine, and waited one or two minutes, until the body of the train had stopped, and then signaled his engineer to back, and he did so. This witness was the only one who claimed that there was any movement of that portion of the train to which plaintiff was coupling until just as he was in the act. Even if the testimony of this witness stood alone, it does not follow that either the witness or plaintiff was negligent. Witness waited until the train came to a full stop. Seward had ordered Barry to put on these cars at that point. Seward was directing the movement of the locomotive at the west end. Barry had a right to suppose, and act upon the supposition, that, knowing that they were at work there, Seward would not order the train to be backed down upon them while they were executing his orders. In the absence of any notice to them that the west end of the train would be moved, or of any signal or warning, Barry and plaintiff would naturally expect that Seward would refrain from doing that which would endanger their lives while in the execution of Seward's orders. Their orders were to put on the cars, and, even conceding that the body of the train had moved, they did nothing until the train had stopped; and why was not this as opportune and proper a time to carry out the orders given them as any subsequent time would have been? If a signal had been agreed upon, and, without waiting for it, they had proceeded, the case would have been different.

Something has been said about the discrepancy in the testimony of the witnesses as to the signals which should have been given. I presume that the nature of the sig-

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nal which should be given would depend very much upon conditions or surroundings.

Under the facts disclosed here, it was clearly error to take the case from the jury. It is unnecessary to determine here whether or not Seward was a fellow-servant. A master is liable for injuries to servants that spring from such negligent acts of fellow-servants as are due to their incompetency. *Hilts v. Railway*, 55 Mich. 437. There was evidence tending to show that Seward was incompetent, and that question was for the jury. Employers may be negligent in the selection of servants as well as in their retention. *Hilts v. Railway, supra.; Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Smith v. Potter*, 46 Id. 258. In the absence of any evidence as to the exercise of care in his selection, proof that a servant who has been in that service but two or three weeks was incompetent when employed need not be supplemented by proof of the company's knowledge of his incompetency. The presumption that defendant had done its duty is overcome by proof that the servant was incompetent when employed. Where one competent at the time of his employment becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency or of the habit must be brought home to the company, or the incompetency or habit must be so notorious as to charge the company with knowledge; but when the incompetency does not arise after the employment, but existed at the time, proof of notice to the company is not necessary.

There was no testimony tending to show that plaintiff had knowledge of Seward's incompetency. He was not qualified to pass upon that question, as he himself expressed it.

The judgment is reversed, and a new trial ordered, with costs.

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MORSE and LONG, JJ., concurred with MCGRATH, J.

GRANT, J. (*dissenting*). Plaintiff was in the employ of the defendant as a helper, or assistant switchman, in its yard at Jackson, Michigan. He received an injury in the hand while engaged in coupling some freight-cars, and brought this suit to recover damages, alleging negligence on the part of the defendant. The negligence claimed is the incompetency of the yard-master, Seward.

In order to maintain the action, it was incumbent upon the plaintiff to prove four facts:

1. The yard-master's incompetency.
2. The defendant's knowledge of it, or that by the exercise of due care it should have known it.
3. Plaintiff's ignorance of it.
4. That his incompetency was the direct cause of the injury.

At the close of plaintiff's case, the court directed a verdict for the defendant.

This yard is what is termed a "double-end yard." The switches converge to a point at either end, so that cars can be pushed in and out from both ends. It was common to work at both ends at the same time when necessary. This was known to the plaintiff, for on direct examination he testified as follows: "With reference to working both ends of the train at the same time, I had never known it to be done before without notifying each crew at each end;" though on cross-examination he testified: "I never worked that way before. I never knew them to work from both ends before this morning." Plaintiff was experienced in railroading, and had been engaged in the yard about a month. The tracks run east and west. The train consisted of 38 cars, and was being made up from both ends. Plaintiff's crew consisted of the switchman, called a "yard conductor," who had charge of the crew, his helper, the plaintiff, engineer,

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and fireman. Plaintiff's crew had been directed by the yard-master to get some freight-cars, and attach them to the east end of the train. Barry, the switchman of plaintiff's crew, had obtained the cars, and brought them towards the east end of the train. It was the duty of the plaintiff to step between the cars, and arrange the coupling. He signaled to Barry to back up the cars. As they backed up and reached the coupling, there was a movement backward of the cars upon the west end of the train, and the plaintiff's hand was caught and injured. The yard-master was engaged with the other crew at the west end, and had himself assisted in coupling the cars.

Plaintiff insists that he was entitled to notice from the yard-master that the cars upon the west end were about to move; that this was negligence; and that it resulted from the yard-master's incompetency. Plaintiff's witnesses do not agree as to the manner in which such notice should be given. Mr. Finch, who preceded Seward as yard-master, testified that he sent a man to the other end of the yard to tell them to be careful, that they were working at the other end of the train. Another witness testified that the yard-master generally stands at the head of the train when they put these cars on, and sees that they do not push them in too close together, to protect the train and train-men. A third witness testifies that he should have stood somewhere near the center of the train, so that he could stop the cars in case they were coming together.

Two crews, of four men each, were at work upon this train. It is evident that the yard-master cannot give personal notice to each employé. He acts through the yard conductors, or switchmen. When these have notice, or knowledge which is equivalent to notice, of how the work is being done, it is then the duty of these con-

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ductors to convey the necessary information to the members of their crews. If they fail to look out for themselves, or the men under their orders, the fault is not chargeable to the yard-master. Previous to the accident Barry had been at the west end of the train, evidently received his orders there from the yard-master, and knew that work was going on at that end in the usual way. He therefore had all the notice that was necessary. When plaintiff gave the signal to Barry to back up, the west end of the train was also backing up to close a gap two or three cars west of where plaintiff stood to make the coupling. Barry waited until he supposed the gap was closed and the cars had stopped. He then communicated plaintiff's signal to his engineer to back up, which the engineer did. Either the west-end cars had not fully stopped, or else, for some unexplained reason, they immediately "jammed back again," as the plaintiff expressed it, causing the accident.

The only business in which both these crews were engaged was the making up of this train. It was the custom to make it up from both ends. This work consisted entirely in taking cars from other tracks, and placing them on one track form both ends of the yard. Of necessity, therefore, the cars must move towards each other. This must have been known to the employés in the yard, who had been there long enough to become acquainted with the business. No fault is found with this method. Plaintiff's witness Finch, the yard-master immediately preceding Seward, testifies that such was the usual method. He says:

"Often had two engines at work at the same time, but I was always very careful about it. I always sent a man to the other end of the yard to tell them to be careful, to look out, that they were working on the other end of the train. I have sent Mr. Lee there several times myself, when he was working for me."

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As already stated, the sole act of incompetency or of negligence complained of is the failure of Seward to notify plaintiff's crew that the train was to be made up from both ends. But it cannot be denied that Barry, the switchman of plaintiff's crew, knew this, and it must follow that any further notice or caution is unnecessary. The learned circuit judge was therefore correct in instructing the jury that there was no evidence showing the negligence of Seward.

The court made no ruling upon the question of the incompetency of the yard-master, but, if it had been important to instruct the jury upon this point, he should have instructed them that the evidence failed to make any case. The uncontradicted evidence is that Seward had been in the employ of the company for about 18 years in and about this yard. He was first messenger boy, then successively office boy, number-taker, car distributor, clerk in train-master's office, chief clerk for train-master, from which last position he was appointed as yard-master. During this time much of his work was in the yard, and it is beyond controversy that he was familiar with the manner of the work, the location of the tracks, and the movement and the handling of the cars. It is too manifest for argument that the simple work of making up these trains is not difficult nor complicated, and that in knowledge and experience Mr. Seward was competent to do it. There is no evidence tending to show that this experience of Mr. Seward was not sufficient to qualify him for the position of yard-master. There was, therefore, no evidence upon which to base a charge that the defendant had employed a yard-master whom it knew, or should have known, to be incompetent. Neither is there any claim on the part of the plaintiff that he had become incompetent after his appointment. No act of incompetency is shown. The

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plaintiff's case in this regard rests solely upon the testimony of four witnesses that Seward had the reputation, among the yard men, of being incompetent. They base this reputation entirely upon the fact that he had had no experience as a switchman. Plaintiff, though he had been employed there daily for a month, had never heard of this reputation. The further significant fact is that none of these witnesses made any complaint or protest against the employment of Mr. Seward. Is it the law that one who has had no experience as a switchman is incompetent to fill the position of yard-master? I can find no authority or reason for such a rule.

Judgment should be affirmed, with costs.

CHAMPLIN, C. J., concurred with GRANT, J.

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NELSON HOLLAND AND FRED M. WHITE v. ALFRED WEED ET AL.

Contempt proceedings—Violation of injunction—Enforcement of civil remedy—Costs.

In contempt proceedings under How. Stat. chap. 256, to enforce civil remedies, a finding by the court that the complainant has sustained an actual loss or injury by the misconduct complained of, and an order for the payment of some sum as compensation therefor, are conditions precedent to an order that the respondent pay the costs and expenses of the proceedings.[1]

Appeal from Gogebic. (Daboll, J., presiding.) Argued June 11, 1891. Decided October 9, 1891.

[1] See *Appeal of George T. Smith*, 86 Mich. 150 (foot-note), for a reference to cases involving contempt proceedings.

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Bill for an injunction. Defendants appeal from decree adjudging them guilty of contempt. Decree reversed, and contempt proceedings dismissed. The facts are stated in the opinion.

Hayden & Young (*Dockery & Kingston*, of counsel), for complainants.

C. F. Button (*Tomkins, Merrill & Smith*, of counsel), for defendants.

CHAMPLIN, C. J. The bill of complaint in this cause was filed for the purpose, exclusively, of obtaining an injunction.

The complainants set out that they had leased certain mill premises of the defendants, and that the lease was to be operative for a year, commencing on the 11th day of November, 1889, and ending on the 11th day of November, 1890. They then set up that the defendants had forcibly taken possession of the premises and excluded them from the property, and asked for an injunction restraining them from interfering with their possession of the mill. This injunction bill was filed on the 7th day of April, 1890.

The facts as claimed by the defendants, and as they appear to us by the record, are that the lease under which the complainants based their entire right to equitable relief was settled under an agreement in which they were relieved from the terms thereof, and the whole matter was adjusted, and the defendants were to have possession of the mill; but at that time, from oversight, the lease to the complainants was not surrendered or canceled otherwise than by the agreement which superceded it. The defendants, having acquired the right under the agreement to the possession of the mill and property, put their men in there in the month of April and earlier to

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prepare the mill for the season's sawing, and, when they had got it nearly prepared for work, the complainants then claimed that they had rights under that lease, and attempted to dispossess the defendants, and to get possession of the property for the purpose, as is quite apparent, of extorting black-mail from the defendants, and compelling them to buy their peace. They obtained an injunction. As they well knew, if the defendants obeyed it, it would work great damage and injury to them, and before the suit could be gotten out of the way they would suffer great inconvenience, loss, and damage. The defendants refused to deliver up possession. It was their property, and in their own possession, and the court should not have awarded an injunction to dispossess them. Complainants proceeded against the defendants for contempt of court in disobeying the injunction, under those provisions of the statute which allow proceedings for contempt in the enforcement of civil remedies. A reference was taken under this proceeding to ascertain the extent that their several rights and remedies had been impaired, and report the same to the court. The proof is returned in the record.

Upon the hearing before the court, the Honorable S. B. Daboll, circuit judge, made the following order:

"In this matter, the defendants, who were heretofore enjoined by the injunction of this court from interfering with certain property as set forth in the proceedings therein, and on showing duly made, have been adjudged guilty of contempt in disobeying said injunction; and the same having been referred to J. S. Monroe, a circuit court commissioner, to take evidence of the amount of damages sustained by the complainants on account of the said contempt; and the said J. S. Monroe, commissioner as aforesaid, having made his report, whereby he reports that he is unable to decide the amount of damages, and returning the evidence taken before him; and the court having examined the said evidence and report, and duly considered the same, does adjudge and decree that the

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said defendants, Alfred Weed and Marshall Hubbard, are guilty of said contempt, and that they pay to the complainants, within ten days after the service of a copy of this order or decree, damages as follows:

For attorneys' fees and expenses	$160 00
Clerk's fees	5 00
And the further sum of twenty-five dollars commissioner's fees	25 00
For witnesses' fees and expenses	10 00
Amounting in all to the sum of two hundred dollars	$200 00

—And, in default of said payment within the said ten days, that the complainants have an execution therefor.

"*Dated, August* 25, 1890.

"S. B. DABOLL, Circuit Judge."

From this order the defendants appeal.

The same circuit judge had previously, on the 30th day of June, 1890, entered his order, upon the coming in of the answer of defendants, dissolving the injunction theretofore issued, and restoring the possession of the mill property described in the injunction to the defendants.

The order made by the circuit judge in this matter of contempt merely orders that the costs and expenses of the contempt proceedings shall be paid by the defendants to the complainants. This order is unauthorized by the statute, which reads as follows:

"If an actual loss or injury has been produced to any party by the misconduct alleged, the court shall order a sufficient sum to be paid by the defendant to such party to indemnify him, and to satisfy his costs and expenses, instead of imposing a fine upon such defendant; and in such case the payment and acceptance of such sum shall be an absolute bar to any action by such aggrieved party to recover damages for such injury or loss." How. Stat. § 7277.

It will be observed that the statute authorizes this imposition in place of a fine, and it is for the purpose

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of protecting the civil rights and remedies of the party, and to compensate him for the injury or loss occasioned by the misconduct alleged; and it is only when an actual loss or injury has been produced to the party by the misconduct alleged, and that is made to appear to the satisfaction of the court, and some sum sufficient to compensate the party or indemnify him is adjudged, that the court can impose the costs and expenses to be paid by such party. In this case there is no finding, and in fact the testimony would justify no finding of the court, that an actual loss or injury had been produced to the complainants by the misconduct alleged, and the court acted wholly without authority in compelling the defendants in such a case to pay the costs and expenses of the proceedings to the complainants.

The action of the complainants from the first was unjustifiable. Their proceedings to obtain an injunction were a fraud and imposition upon the court, and it would be the grossest injustice to compel the defendants in this suit to pay them the costs and expenses that they have been put to in order to impose upon the court in the manner in which they have. It is true that the orders and process of a court, regularly issued, should be obeyed, and the court has it in its power, by punishment for contempt for disobedience of them, to protect its dignity and enforce its decrees. But in cases like this, where the orders of the court have been prostituted by unworthy methods in seeking unworthy ends, and where a party appeals to the court for process of contempt to enforce his civil remedies when he has none to enforce, the courts are not called upon to protect their dignity by the imposition of any fine or costs.

I think the decree appealed from should be reversed, and the contempt proceedings dismissed, with costs of both courts against the complainants.

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MORSE and MCGRATH, JJ., concurred with CHAMPLIN, C. J.

GRANT, J. The bill of complaint in this cause was filed April 7, 1890, and a preliminary injunction granted *ex parte*, restraining the defendants from interfering with the property described in the bill, or with the complainants' possession thereof, until the further order of the court. Defendants paid no heed to the injunction, but took and retained forcible possession of the property in defiance thereof. They took no steps to obtain a dissolution until June 20, 1890, when they filed their answer, and met the equities of the bill so fully that the court dissolved the injunction.

April 22, 1890, complainants instituted these proceedings to punish the defendants for contempt of court in violating the injunction. August 25, 1890, they were adjudged guilty of contempt, and were ordered to pay damages as follows:

For attorneys' fees and expenses	$160 00
For clerk's fees	5 00
For commissioner's fees	25 00
For witnesses' fees and expenses	10 00

From this order defendants appeal.

Three objections are raised to the validity of the order:

1. The circuit judge had no jurisdiction to allow the order for an injunction.
2. Defendants were in possession of the property at and prior to the service of the injunction, and could not be dispossessed thereby.
3. The measure of damages included only the taxable costs.

1. The judge of the twelfth judicial circuit, within which Gogebic county is situated, was absent from the State sick. The adjoining circuit was the twenty-fifth, but there was a vacancy there on account of the resigna-

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tion of the judge. Judge Steere, of the eleventh circuit, had been appointed by the Governor to fill such vacancy until the election. He was therefore the acting judge of the twenty-fifth circuit, with full power to do all acts which a regularly elected judge might do. By Chancery Rule 112 the circuit court commissioner was prohibited from issuing an injunction in this case. But, aside from these questions, it will be presumed that the circuit judge acted upon due proof of the existence of the facts necessary to give him jurisdiction. *Landon v. Comet*, 62 Mich. 80. Defendants have made no showing to rebut this presumption.

2. The bill made out a case for granting an *ex parte* preliminary injunction. It was then the clear duty of the defendants to respect and obey the injunction. They could have answered immediately, and have promptly moved the court for a dissolution or modification. They could easily have done this within five or six days. But they chose to take the law into their own hands, and wait more than two months before answering, and taking that orderly course dictated alike by reason and law. Such conduct cannot be too severely reprimanded. They cannot in this proceeding be heard on the merits of the controversy. By the terms of the lease executed by defendants to complainants, the complainants were entitled to possession, and claimed that they had it. Defendants in their answer claim that this lease had been superseded by other arrangements, and that they were in possession. The property was a saw-mill, which was not run in the winter, and this controversy appears to have arisen in the spring, when each party desired to put the mill in repair for the season's work. The was no actual occupancy of the mill during the winter.

If the defendants were in the actual possession of the property, fairly obtained, they ought not to have been dis-

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possessed by an *ex parte* injunction. Under such circumstances, they would have been justified in retaining possession until they could have applied to the court.

3. This proceeding was brought under How. Stat. § 7277, which gives the court jurisdiction only in case where—

"An actual loss or injury has been produced to any party by the misconduct alleged."

No actual loss or injury was found by the court, and the proceedings should therefore have been dismissed. The items decreed to be paid were costs which would follow a finding of loss or injury. Without such loss or injury costs could not be decreed.

For this reason the order appealed from must be reversed, and proceedings dismissed, with costs of both courts against the complainants.

LONG, J., concurred with GRANT, J.

JOHN K. FISKEN v. THE MILWAUKEE BRIDGE & IRON WORKS (A CORPORATION).

[See 86 Mich. 199.]

Assignment of money due—Lien—Priorities.

An application for a rehearing in this case is denied, for reasons stated in the opinion.

Application by plaintiff for rehearing of case reported in 86 Mich. 199. Submitted June 17, 1891. Denied October 9, 1891. The facts are stated in the opinion.

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Barbour & Rexford, for motion.

McGRATH, J. Plaintiff moves for a rehearing—

"1. Because the Court, in its opinion, totally ignored the agreement between Esson and defendant, annulling the original agreement between them of November 14, 1887.

"2. Because the Court, in its opinion, totally ignored the settlement made between Esson and defendant.

"3. Because the said agreement, and the settlement thereunder, are of such pre-eminent and controlling force and effect as to render the point upon which the judgment was reversed entirely untenable, in law or equity, and the Court must have entirely overlooked it."

Plaintiff seeks to recover a 15 per cent. drawback upon a contract entered into November 14, 1887, between defendant and Esson, under an assignment from Esson, but at the hearing he relied upon what he calls an "agreement" entered into between Esson and defendant, August 3, 1888. Accompanying this agreement is a statement showing that, under his contract, Esson had performed work amounting to $15,520.67, and had been paid $12,809.57, and had on hand in Detroit stone valued at $11,075.50.

By the terms of the agreement of August 3, 1888, defendant agrees to pay Esson the $15,520.67. Esson agrees to credit defendant with $12,809.91 already paid. Defendant agrees to purchase, and Esson agrees to sell, the stone on hand at Detroit aforesaid, as well as other stone at Amherstburg and Marblehead, already cut and quarried for use in the Belle Isle bridge, at prices named. Esson agrees to deliver and turn over to the defendant the stone aforesaid, free and clear from all claims and liens, before any payment is to be made for said stone, or defendant may pay any claims and liens, and deduct the amount so paid. The delivery of said stone at Amherstburg and Marblehead is to be made not

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later than six weeks from date, and the delivery of the stone at Detroit is to be made at once, and as soon as all claims and liens upon it are paid.

Plaintiff seeks to charge defendant, under this second or substituted contract, for the amount of stone on hand at Detroit, irrespective of whether or not the claims or liens upon it had been paid by Esson or by defendant, and without even showing that the stone had been delivered thereunder.

The testimony tended to show that there had been no settlement between Esson and defendant; that the total amount of Esson's work under his first contract, added to the value of the stone then on hand at Detroit, aggregated the sum of $26,596.17; that the stone had not been delivered to the defendant; that, under defendant's contract with the city of Detroit, the defendant was bound to complete the bridge at a given time, and that Esson was clearly bound by this provision; that defendant was compelled to pay about $24,700 to satisfy claims for material and labor in order to avail itself of work which had been done with reference to this bridge contract, so that it might complete the bridge within the life of its contract with the city. The defendant contended, and offered testimony tending to show, that it had paid such claims as its necessities compelled it to pay; or, as a witness puts it, "We have paid such claims as we were compelled to, from the nature of the case."

There is no testimony tending to show that this subsequent arrangement was collusive, for the purpose of cutting off plaintiff; but the testimony tends to show that Esson was involved, and, if unable to complete his contract, defendant had the undoubted right to avail itself of what had been prepared with reference to this contract, and if, in order to avail itself of this work, it was

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compelled to pay its full value, neither plaintiff nor Esson has any claim against defendant, simply because defendant agreed to pay Esson a certain amount for it, especially in view of the provision that it was to be free and clear of all liens and claims, and, if not, defendant, at its option, might pay such liens and claims.

Defendant will not be allowed, by collusion with Esson, to defraud plaintiff, but, on the other hand, in the absence of anything tending to show fraud, plaintiff occupies no better position than does Esson, except so far as any voluntary payment may have been made to Esson after notice of the assignment.

A rehearing must be denied.

The other Justices concurred.

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HENRY WRIGHT AND ORRY WATERBURY v. ALBERT WEIMEISTER, SURVIVOR OF HIMSELF AND JOHN WEIMEISTER, DECEASED.

Partnership—Pleading—Evidence.

1. An objection that proof that the defendants in an attachment suit are copartners is inadmissible, because not charged to be such in the affidavit for the writ and in the declaration, but simply as joint debtors, cannot be raised for the first time in the appellate court.
2. In a suit prosecuted against the surviving member of a banking firm, who denies its existence, but of which fact convincing evidence has been given, the statements of a cashier, whose general agency has been established, made to the plaintiffs, who contemplated making deposits, as to the existence of the firm, are admissible in evidence as part of the *res gestae*, as is the plaintiffs' testimony that they made deposits in reliance

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upon the information thus received, and that from the time of such conversation they understood that the surviving defendant and his deceased co-defendant composed the firm; the last point being ruled by *Parshall v. Fisher*, 48 Mich. 529.

3. Where on the dissolution of a banking firm, and the formation of a new one to continue the business, the certificate required by How. Stat. §§ 3128, 3129, giving the names of the members of the new firm, etc., is not filed with the county clerk, such omission cannot be shown by a surviving member of the new firm, in a suit involving the question of its existence, in support of a claim that until the filing of such certificate the old firm could not be legally dissolved and a new one formed.

4. The evidence in this case, which is summarized in the opinion, is held to establish the copartnership relation of the original defendants, in fact as well as to third persons.

Error to Livingston. (Newton, J.) Argued June 10, 1891. Decided October 9, 1891.

Assumpsit. Defendant brings error. Affirmed. The facts are stated in the opinion.

D. Shields, for appellant, contended:

1. There is a variance between the pleadings and the proofs on the question of partnership; citing *Mead v. Raymond*, 52 Mich. 14; *Moore v. Nason*, 48 Id. 300; and plaintiffs cannot be permitted to change the theory of their case, as determined by their declaration and prior proceedings, by making proof of a partnership, they having proceeded against defendants as *joint debtors;* citing *Stove Co. v. Osmun*, 73 Mich. 575.

2. The statements of Mr. Hammell were not within the scope of his authority, and do not fall within the rule which makes the statements of an agent competent, and his admissions cannot be assimilated with those of the principal; citing Dunl. Pal. Ag. 269, 270; and to constitute such statements *res gestae*, they must have been made at the time the money was deposited; citing 1 Greenl. Ev. §§ 113, 114.

3. The partnership cannot be proven by proof of the statements of the defendant that he was a member of the firm; citing 1 Greenl. Ev. § 177; and for the purpose and application of the doctrine of estoppel, see Herm. Estop. 1, 2; *Dickerson v. Colgrove*, 100 U. S. 578; 1 Jacobs & C. Dig. 792–800.

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L. S. Montague (*W. W. Mitchel*, of counsel), for plaintiffs, contended for the doctrine of the opinion.

GRANT, J. This is an action of *assumpsit*, commenced by attachment September 25, 1889, against John and Albert Weimeister. John died October 3, 1889; and April 29, 1890, his death was suggested, and the suit revived against the defendant. The sole question in controversy was whether John and Albert were copartners.

John Weimeister and one Neil O'Hearn had been for many years engaged in general merchandising and banking in the village of Howell. August 8, 1889, they dissolved, O'Hearn selling to John Weimeister. John Weimeister continued in the business, and plaintiffs claim that Albert became a partner with John; and also that, whether he was in fact a partner or not, he is estopped by his acts and conduct from denying it. Upon the dissolution of the firm of Weimeister & O'Hearn the business was continued, both in banking and merchandising, under the name of John Weimeister & Co., until September 25, 1889, when John Weimeister executed an assignment for the benefit of his creditors, and both the bank and the store were thereupon closed.

Albert admits that for some time prior to the dissolution on August 8 there had been an understanding between himself and John Weimeister that O'Hearn should go out and Albert should become a partner; that upon the dissolution of the old firm he immediately commenced to sign drafts by the name of John Weimeister & Co., and continued to do so up to the time of the failure; that he went to Detroit, and ordered a stamp, which read, "John Weimeister & Co., Successors;" also another, which read, "John Weimeister & Co. Paid,"—which stamps were in constant use; that he bought goods in the name of the new firm, informing the vendors that

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he was a member of the firm; that he knew it was generally understood in the community that he was a member of the firm; that he was frequently congratulated upon the fact, and never denied it; that he ordered printed note-heads, headed "John Weimeister & Co.," with the name of John Weimeister in one corner and Albert Weimeister in the other, which were used and circulated by them. Besides these admissions, the dissolution of the old firm and the formation of the new one, composed of John and Albert Weimeister, was announced in the two newspapers published in the village of Howell. This was done at the request of John Weimeister, and in one instance in the presence of Albert. Many witnesses testified that Albert informed them that he was a partner. Many more testified that John informed them that Albert was a partner. Albert had been in the employ of Weimeister & O'Hearn, but after August 8 he performed duties, such as the signing of checks, which he had not done before, and which none but the partners of the old firm had ever done. One Hammell, who had been for many years the cashier of the bank, and had had almost the entire charge of the banking business, informed the customers that the new firm was composed of John and Albert.

No other conclusion could honestly have been reached by the jury than that John and Albert were not only estopped from denying that they were partners, but that they were partners in fact.

After this statement of facts, the alleged errors can be very readily disposed of.

1. The affidavit for attachment and the declaration did not alleged that John and Albert were partners. They simply alleged that John and Albert, the defendants, were justly indebted to the plaintiffs in a certain sum. It is insisted that proof of the partnership was inadmissible

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under the pleadings. This objection was not made in the court below, and cannot now be raised here. The point is too technical to require further comment.

2. At the time of the change in the firm plaintiffs had a deposit in the bank, and were also contemplating future deposits, which were afterwards made. On learning of the change, the plaintiff Wright went to the bank to ascertain the facts in regard to it. Neither John nor Albert was there. Mr. Hammell was there, in sole charge of the business, as was usually the case. Mr. Wright sought information in the due course of business. His future course would be shaped by the information obtained. He went to the usual place of business. He found there the general agent in charge. He went to the proper place and to the proper party to make inquiries. This testimony was objected to as incompetent, and this is the principal question now in controversy. When this testimony was offered, Hammell's agency had been fully established, and convincing evidence of the existence of the partnership had been introduced. The evidence was properly admitted. The statements were part of the *res gestae*.

3. It was competent for the plaintiffs to testify that they subsequently deposited money in the bank, relying upon the information they received from Mr. Hammell. It was necessary for the plaintiffs to prove this under the theory of estoppel.

4. Under the circumstances of this case, we see no error in permitting the plaintiff Wright to testify that from the time of this conversation with Mr. Hammell he understood that John and Albert composed the firm. This point is ruled by *Parshall v. Fisher*, 43 Mich. 529.

5. The statute of Michigan requires that all persons engaged in the business of banking shall make and file with the county clerk a certificate in writing, setting

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forth the names of the members of the firm, and certain other facts. It also provides that in case of a change in the name or style of a firm a new certificate should be filed, and that until such new certificate shall have been filed the members of the old firm shall be held to be the actual members, liable for any obligation incurred by the firm. How. Stat. §§ 3128, 3129. The circuit court rejected evidence that no such certificate had been filed by John and Albert Weimeister. Defendant's counsel insists that, until this certificate was filed, the old firm was not legally dissolved, and that Albert could not become a partner. This position is untenable. Persons engaged in the banking business will not be permitted thus to take advantage of their own neglect of duty.

We find no error in the record, and the judgment is affirmed.

The other Justices concurred.

ASA VAN KLEECK AND PATRICK J. HAMMELL, ADMINISTRATORS OF THE ESTATE OF JOHN WEIMEISTER, DECEASED, v. JOHN MCCABE.

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136	575

[See *ante*, 594.]

Partnership—Assignment for benefit of creditors—Death of party—Revival of suit—Res judicata—Evidence—Attachment.

1. An assignment by one partner of *his* property for the benefit of his creditors, which does not purport to convey the partnership property, gives the assignee no title to said property or right to its possession.
2. Where, in a suit involving the question of the existence of a

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partnership between the defendants, one dies, and the suit is revived and prosecuted against the surviving defendant alone, a judgment establishing the existence of the partnership is not binding upon the administrators of the deceased defendant.

3. Third persons who deal with parties who represent themselves as partners in a business are entitled to have the property used in that business applied to the payment of their debts in preference to the individual debts of such parties.

4. One partner cannot avoid liability for the firm debts by proof that he was induced to enter into the partnership relation by the false statements of his copartner as to the value of the firm property.

5. One partner cannot avoid liability in a suit brought against the firm, which he defends as survivor, by showing that he disclaimed all interest in the property, and assented to its assignment by his copartner as his individual property for the benefit of *his* creditors; and the same rule obtains where such partnership exists as to third persons, although not *in fact* as between the parties themselves.

6. Where, after the commencement of a suit against two partners, one of them dies, the suit is properly revived and prosecuted to judgment against the surviving defendant, the administrator of the deceased defendant not being a necessary party. How. Stat. § 7401.

7. The presentation of a claim against a partnership for allowance against the estate of one of the partners, who has died since the commencement of a suit against the firm for its collection, will not operate as an abandonment of the suit. *Manning* v. *Williams*, 2 Mich. 105.

8. A diligent creditor, who has secured a lien by instituting proper legal proceedings, is not deprived of it by the death of one of his debtors, if the suit is revived and prosecuted to judgment in the manner provided by law.

9. All of the acts of a surviving partner, and the result of suits brought by or against him as a survivor, are binding upon the representatives of the deceased partner, so long as they are conducted in good faith.

Error to Livingston. (Newton, J.) Argued June 10, 1891. Decided October 9, 1891.

Trover. Defendant brings error. Reversed. The facts are stated in the opinion.

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L. S. Montague (*W. W. Mitchel*, of counsel), for appellant.

D. Shields, for plaintiffs, contended:

1. Where it is sought to charge several defendants as partners, an admission of the *fact* of partnership by one is not receivable in evidence against the others to prove the partnership; citing 1 Greenl. Ev. § 177; Colly. Part. § 778; and the partnership must first be proved before the declaration of one partner can affect the others; citing *Allcott v. Strong*, 9 Cush. 328; *Dutton v. Woodman*, Id. 255; *Tuttle v. Cooper*, 5 Pick. 414; *Robbins v. Willard*, 6 Id. 464; *Sager v. Tupper*, 38 Mich. 265; *Parshall v. Fisher*, 43 Id. 532; and a partnership cannot be proved by general reputation; citing *Gay v. Fretwell*, 9 Wis. 186; *Sager v. Tupper*, 38 Mich. 261, 262; and admissions of partnership may be contradicted or explained; citing 1 Lind. Part. 87, 88.

2. The administrators of John Weimeister's estate were made parties to the attachment suit, and then dropped out on motion of the plaintiffs, and the case proceeded to judgment against the surviving defendant alone, which made it an individual judgment, to satisfy which only his sole property could be seized; citing Herm. Ex. § 213; *Hardin v. McCanse*, 53 Mo. 255; *Bowdoin v. Jordan*, 9 Mass. 169; *Johnston v. Lynch*, 3 Bibb, 334; *Shelton v. Hamilton*, 23 Miss. 496; *Hodge v. Mitchell*, 27 Id. 560; *Wade v. Watt*, 41 Id. 248; *Coleman v. McAnulty*, 16 Mo. 173; *Warder v. Tainter*, 4 Watts, 278; *Day v. Sharp*, 4 Whart. 339; *Douglass v. Massie*, 16 Ohio, 271; and recourse cannot be had to the estate until the plaintiffs have exhausted their remedy against their own chosen defendant, and then only in equity, or possibly before commissioners on claims against the estate; citing 1 Lind. Part. 195, 250; 2 Id. 593, 603; *Lewis v. Conrad*, 11 Iowa, 153; *Weyer v. Thornburgh*, 15 Ind. 124; *Slatter v. Carroll*, 2 Sandf. Ch. 573; *Lawrence v. Trustees*, 2 Denio, 577; *Vorhis v. Child*, 17 N. Y. 354; *Copcutt v. Merchant*, 4 Bradf. 18; *Vance v. Cowing*, 13 Ind. 460; *Storer v. Hinkley*, Kirby, 147; *Horsey v. Heath*, 5 Ohio, 353; *Jackson v. King*, 8 Leigh, 689; and the judgment against Albert is not evidence of the indebtedness as against the estate; citing *Trustees v. Lawrence*, 11 Paige, 80.

GRANT, J. Plaintiffs sued the defendant, who is sheriff of the county of Livingston, in trover, for the conversion of the goods seized by him under a writ of attachment

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issued in the suit of *Henry Wright and Orry Waterbury v. John Weimeister and Albert Weimeister,* in which the judgment rendered in favor of the plaintiffs has been affirmed by this Court. 87 Mich. 594.

John Weimeister made a general assignment for the benefit of his creditors on September 25, 1889, to the plaintiffs, now his administrators. The assignees took no possession of the property, filed no bond, and made no inventory, for the reason, as they testified, that John Weimeister died before these were completed, and before the time had expired within which they should have completed and filed them. It is unnecessary to consider the effect of this assignment, for it did not purport to convey the partnership property of John Weimeister & Co., if such a partnership existed. The assignees, therefore, would take no title to, and have no right to the possession of, the partnership property. If, therefore, the partnership actually existed between John and Albert, the title to the property belonging to it still remained in the firm, and upon the death of John the title thereto became vested in Albert as the surviving partner. In all matters connected with the partnership he was the proper party to sue and to be sued. If a partner, it became his duty to close up the partnership matters, collect the assets, pay the debts, and then distribute the fund. Until the partnership fund is ready for distribution, the representatives of the deceased partner have no right to interfere, so long as the surviving partner is proceeding, in good faith, to wind up its affairs. *Barry v. Briggs,* 22 Mich. 201; *Pfeffer v. Steiner,* 27 Id. 537; *Merritt v. Dickey,* 38 Id. 41; *Bassett v. Miller,* 39 Id. 133.

On all other material questions, except the assignment, the evidence is the same in the present case as in that of *Wright v. Weimeister, ante,* 594, and it is unnecessary to repeat it here. Mr. Hammell was a witness in this

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case, but not in the other, and does not deny the statements, made by Wright and others, that he informed them that the firm of John Weimeister & Co. was composed of John and Albert.

It is insisted by the defendant that the former suit involved the same issues as this, and that it therefore concludes the rights of the parties. If John Weimeister had lived till the suit was tried and judgment rendered, the question would have been *res judicata*, both as to him and Albert. It is undoubtedly true that all the acts of a surviving partner, and the result of suits brought by and against him as survivor, are binding upon the representatives of the deceased partner, so long as they are conducted in good faith. But in the present case the existence of the partnership is disputed, and is the real question at issue. This being settled, there can be but little doubt as to the rights of the parties. Upon this question John Weimeister, in his life-time, did not have his day in court, nor have his representatives since his death. The judgment in that suit is therefore not binding upon them.'

The rights of the parties to this suit depend upon two questions of fact:

1. If John and Albert Weimeister were copartners in fact, then verdict and judgment should be rendered for the defendant.
2. If they were not in fact copartners, but had held themselves out as such, and the plaintiffs in the attachment suit had dealt with them upon the faith of such representations, and in the honest belief that they were copartners, and the property levied upon belonged to the business in which they represented themselves as copartners, then verdict and judgment should be for the defendant.

Persons who deal with parties representing themselves as partners in a business are entitled to have the property

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used in that business applied to the payment of their debts in preference to the individual debts of those representing themselves as partners. This rule may operate severely upon the individual creditors, but a contrary rule would operate just as severely upon the partnership creditors.

The testimony of Albert Weimeister that he was misled by the statements of John as to the value of his property was incompetent. Whether John intentionally or unintentionally made false statements to Albert, and thus induced him to enter into the partnership, could not affect his liability to those who had meanwhile trusted them. Albert was in a better position than were their creditors to ascertain the assets of John, and their value. He cannot avoid liability by saying John defrauded him.

Plaintiffs introduced evidence tending to show that Albert was present when John executed the assignment, and was then asked by the attorney for John if he should also execute the assignment, and then he disclaimed having any interest in the property. This might be competent evidence in a controversy between John and Albert, and the fact might estop Albert from laying any claim to the property as against John or his assignees; but this doctrine cannot be invoked by the representatives of John in an adverse proceeding brought by creditors against them both. If they were partners, it was the duty of Albert, as well as of John, to protect the partnership creditors. If they had held themselves out as partners, while not so in fact, the same duty rested upon them both. Albert could not, in either event, avoid this liability by consenting that the property might be assigned as the individual property of John. The same rule also applies to statements made by John at the same time. This testimony should have been excluded.

The circuit judge was in error in instructing the jury

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that the prosecution of the suit against Albert as survivor was an abandonment of the suit against John, and that the plaintiffs in the attachment suit should have proved their claim against John's estate, or have proceeded in equity to settle the rights of the estate and creditors. We need not determine whether the administrators might properly have been made parties defendant. It is sufficient to say that they were not necessarily parties, and that the action was properly revived against Albert as survivor. How. Stat. § 7401. They might have presented their claim against the estate, but this would not have operated as an abandonment of their suit. *Manning v. Williams*, 2 Mich. 105.

No attempt was made to obtain a dissolution of the attachment, and it will therefore be presumed that there were valid grounds for the issuance of the attachment. A creditor who, by his diligence in instituting proper legal proceedings, has obtained a lien, is not deprived of it by the death of one of his debtors, when the suit is revived and prosecuted in the manner provided by law. His lien is continued, and upon the rendition of judgment the property attached may be seized and sold under an execution.

Judgment is reversed, with costs, and a new trial ordered.

The other Justices concurred.

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JOHN FEHNRICH, BY HIS NEXT FRIEND, EMILIE FEHNRICH, v. THE MICHIGAN CENTRAL RAILROAD COMPANY.

Railroad companies—Trespasser—Contributory negligence.

1. Under our own decisions, this case should have gone to the jury; citing *Railroad Co. v. Van Steinburg*, 17 Mich. 100; *Hassenyer v. Railroad Co.*, 48 Id. 205; *Cooper v. Railway Co.*, 66 Id. 261.

2. The following propositions are summarized from the opinion of Mr. Justice MORSE, in which MCGRATH and LONG, JJ., concurred:

   a—The ownership of a railroad company in its tracks upon a public street crossing is not such as to make a man a trespasser unless he travels squarely across them.

   b—If the language used in the majority opinion in *Kelly v. Railroad Co.*, 65 Mich. 186, is to be so construed that a man, while walking in the street, cannot go diagonally across a railroad crossing, or, if he wishes to leave the street at that point, cannot walk between the tracks in so doing, without being a trespasser, I must respectfully decline to be bound by it.

   c—It has never yet, I think, been announced as negligence *per se* to cross a railroad track in a public highway either in the front or rear of a standing engine and tender; and whether it is negligence to turn one's back upon the rear of such engine and tender, and take a few steps away from them (walking between the tracks), seems to me to depend upon the circumstances of the particular case in which it is done, and, if so, the determination of the question is very appropriately one for a jury.

   d—One put suddenly in peril is not imperatively required to do that which, after the peril is ended, it is seen he might have done and escaped. The law makes allowance for the fright and lack of coolness of judgment incident to such a peril.

Error to Jackson. (Peck, J.) Argued June 12, 1891. Decided October 9, 1891.

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Negligence case. Plaintiff brings error. Reversed. The facts are stated in the opinions.

Dwight D. Root, for appellant, contended for the doctrine of the majority opinion, and relied upon the cases therein cited.

Parkinson & Day (*Henry Russel* and *Ashley Pond*, of counsel), for defendant, contended:

1. One using a railroad track as a highway is a trespasser, and the company does not owe him the duty it does to a traveler upon a highway at a railroad crossing; citing *Kelly v. Railroad Co.*, 65 Mich. 187, 190–192.
2. In support of the claim of contributory negligence on the part of plaintiff, counsel cited *Railroad Co. v. Miller*, 25 Mich. 274, 283; *Railroad Co. v. Coleman*, 28 Id. 440, 447; *Railroad Co. v. Campau*, 35 Id. 468; *Railway Co. v. Smith*, 46 Id. 504, 510; *Bresnahan v. Railroad Co.*, 49 Id. 410; *Mahlen v. Railway Co.*, Id. 585, 590; *Pzolla v. Railroad Co.*, 54 Id. 274, 277; *Ecliff v. Railway Co.*, 64 Id. 202, 203; *Mynning v. Railroad Co.*, Id. 101, 67 Id. 678, 682; *Freeman v. Railway Co.*, 74 Id. 86, 94–98; *Gebhard v. Railway Co.*, 79 Id. 586, 588; *Guta v. Railway Co.*, 81 Id. 291; *Brady v. Railroad Co.*, Id. 618–624; *Apsey v. Railroad Co.*, 83 Id. 441; *Improvement Co. v. Stead*, 95 U. S. 161; Beach, Cont. Neg. pp. 181–195.
3. One injured in crossing a railroad track is *prima facie* in fault, and must show affirmatively that his fault and negligence did not contribute to the injury in order to recover; citing *Railway Co. v. Howard*, 124 Ind. 280; and in such cases negligence on the part of the defendant must be shown as the efficient cause of the injury, without contributory fault in the plaintiff; citing *Railway Co. v. Smith*, 46 Mich. 504; *Brown v. Railway Co.*, 49 Id. 153; *Henry v. Railway Co.*, Id. 495; *Mitchell v. Railway Co.*, 51 Id. 238.

MORSE, J. The plaintiff, a boy about 14 years of age when the accident happened, brought this suit to recover damages for injuries received by him while upon defendant's track in a public street in the city of Jackson. The court took the case from the jury on the ground of the contributory negligence of the plaintiff.

The injury occurred September 19, 1887. The boy

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could not speak or understand English very well, having arrived in this country from Germany in the latter part of July, 1887. He was 14 years of age in June of that year. He was living with his uncle, and had started to go to his place of work in the north-western part of the city. He was hurt while crossing the railroad tracks on Park avenue. There are several tracks crossing the street at this point. As he approached the crossing, he saw an engine and tender on the east side of the street, and close to it, standing still, and one man with it. The tender was nearest the street, and there was some testimony tending to show that the tender stood in the street. He was walking nearly in the center of the street, intending, as he says, to cross the tracks, passing around the east end of the depot out on Main street, thence westerly and north-westerly to his work; but changed his mind while crossing the tracks, and concluded to go from the street he was on to Main street, along the platform on the south side of the depot. As this thought came in his mind, he stepped between the rails of the track upon which was this engine and tender, and, with his back to the tender, took two or three steps up the track to the west. While he was on the track the engine backed up, started quickly, and came towards him. When he saw it, he says he was "rattled," and jumped first to the left and then to the right. The tender caught him by the heel. He was dragged some distance. One leg was cut off, the other foot was crushed, and he received some other injuries. He testified that no whistle was blown or bell rung before the engine started, and he did not hear it coming until it was right upon him. In this he is corroborated by two witnesses, —one who was a switchman in the employ of the defendant at the time of the accident, and the other also a switchman. Both saw the accident, and testified that no

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whistle was blown or bell rung when the engine backed upon plaintiff. One said: "The engine is pretty quick. It responds quickly to the action of the engineer. A yard-engine is quicker than an engine used to pull trains."

Park avenue runs in a northerly and southerly direction, and the passenger or station house of the defendant extends out into what would be such avenue if it ran in a straight course. But north of the railroad crossing it bears to the east, and passes around the station-house. Main street intersects Park avenue about 16 rods north of the east end of the passenger-house, and also crosses the railroad tracks a short distance north-westerly of the passenger-house or depot, and about 20 rods north-westerly of Park-avenue crossing; the said tracks, Park avenue, and Main street forming a triangle. There was no sidewalk along the west side of Park avenue next the depot building, and no platform on the east end of said building, but one on the south side. Therefore, when the plaintiff started to change his direction, he was taking a shorter cut, and was also influenced probably by this platform.

It is contended, in support of the direction of the circuit judge, that the plaintiff had lived in Germany, in a town where there was a railroad; that he knew the danger of a railroad crossing; that he was a boy of average intelligence, and had no business to turn his back to the engine and walk upon the track as he did; that this was not ordinary prudence.

It is also claimed that he was a trespasser upon defendant's tracks. This claim is based upon the fact that, although in a public highway, he had turned to go off from it, and was using the street, not as a traveler along and upon Park avenue, but was taking the track

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of the company to get off the street on a more direct route than the avenue to his work, and was traveling without reference to the public streets. It is said in the brief: "If in coming along the street onto defendant's tracks he enjoyed the rights of a traveler, he had ceased to exercise those rights."

I think the plaintiff had an undoubted right to use this street for the purpose of travel to his work, and he would not be a trespasser in walking upon any part of it, or in getting off of it in any direction or way that he saw fit. He might be negligent in walking between the tracks of the defendant, but he could not be a trespasser while in the pursuit of his lawful business. I do not understand that the defendant has such an ownership in its tracks upon a public street crossing that a man is a trespasser unless he travels squarely across them.

The case of *Kelly v. Railroad Co.*, 65 Mich. 186, is relied upon to sustain this claim that the plaintiff was trespassing upon the defendant's right of way at the time he was run over. In that case, Kelly was not using the highway as the plaintiff was. It is true, he was struck while on Vinewood avenue, but he had not entered the avenue for the purposes of travel. He was simply crossing the street because it came in his way while he was traveling on the railroad track, when he knew that men had been placed at the crossings to warn people from traveling on the railroad tracks. Kelly left his home, and chose his route upon the railroad track, and had traveled upon it from a quarter to half a mile before he reached Vinewood avenue, and contemplated walking beyond the crossing upon the track to the shops where he worked. He was traveling on the track, and not on the street. "His meeting the engine at that particular spot was a mere coincidence." If the language used in

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the majority opinion in the Kelly case is to be so construed that a man, while walking in the street, cannot go diagonally across a railroad crossing, or, if he wishes to leave the street at that point, cannot walk between the railroad tracks in so doing, without being a trespasser, then I must respectfully decline to be bound by it. In Kelly's case the decision of the Court rested upon the peculiar facts of his case, that he was not using the street for travel at all, but was walking on the company's right of way, and was no more walking in the highway than he would have been in a field or wood through which the railroad track passed. The highway was not his road, but a crossing of his road, over which he was passing because it came in his way, and for no other reason.

I also think that the question of the contributory negligence of the plaintiff was for the jury. The knowledge that he had of railroads was meagre, and he might well have supposed, considering his age, that the engine would not start up and cross the street without some signal of danger or warning of its approach. It is for a jury to determine his ability and capacity for understanding the danger, and whether he used such ability and capacity prudently for one of his years and under all the circumstances of the case. It seems he only took two or three steps between the rails, and there is no evidence that he intended to keep upon this track after he left the highway. He thought to take a short cut, and started for the platform, and to reach it he would soon have been obliged to leave the track. Whether it was careless to take these two or three steps even, with his back to a standing engine, is something not in the province of a court to declare as a matter of law. I doubt if it would have been negligence as a matter of law in an adult, but

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in the case of this boy it is a question to be settled by 12 men.

The case of *Bird v. Railroad Co.*, 86 Mich. 79, cited by defendant's counsel, does not apply. In that case the deceased was killed in attempting to climb over the bumpers between the cars. It has never yet, I think, been announced as negligence *per se* to cross the railroad track in a public highway either in the front or rear of a standing engine and tender; and whether it is negligence to turn one's back upon the rear of such engine and tender, and take a few steps away from them, seems to me to depend upon the circumstances of the particular case in which it is done, and, if so, the determination of the question is very appropriately one for a jury.

It is also contended that, if the plaintiff had not been "rattled," he might have escaped. One put suddenly in peril is not required imperatively to do that which, after the peril is ended, it is seen he might have done and escaped. The law makes allowance for the fright and lack of coolness of judgment incident to such peril. It would be absurd to require of this boy, when he saw and heard the car upon him, and was suddenly called upon to decide how he should escape it, to exercise the same coolness and forethought that an uninterested by-stander might manifest. *Strand v. Railway Co.*, 64 Mich. 219. Under our own decisions, this case should have gone to the jury. *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 100; *Cooper v. Railway Co.*, 66 Id. 261; *Hassenyer v. Railroad Co.*, 48 Id. 205.

In stating the facts of this case, regard has been had only to the evidence on the part of the plaintiff. If the witnesses for the defense are to be believed, there is no question but the plaintiff was negligent. But the truth of the issue made in the record is for a jury to deter-

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mine, and on the plaintiff's showing there is certainly made a case upon which reasonable men might fairly differ in passing upon the question of his negligence.

The judgment is reversed, and a new trial granted, with costs of this Court to plaintiff.

McGRATH and LONG, JJ., concurred with MORSE, J.

GRANT, J. (*dissenting*). Plaintiff was injured by the tender of a switch-engine in a public street known as "Park Avenue," in the city of Jackson, where that avenue crosses the defendant's tracks, September 19, 1887. He claims that the tender and engine were backed up against him without any warning by ringing the bell or blowing the whistle. The allegation in the declaration is that he was injured "while walking on and along said public highway, with all due care and caution."

Plaintiff was 14 years and three months old. He was born and reared in Germany, in a town of about 2,000 inhabitants, through which a railroad passed. He there lived within half a mile of a railroad crossing, and saw the cars daily. He went to school till he was about 14 years old, when he came to this country, arriving at Jackson in July, 1887, where he lived with his uncle. On the morning of the accident he was on his way to his daily work, being late. On page 614 is a diagram showing the situation of Park avenue, the railroad tracks, and the passenger-house.

Main street crosses Park avenue nearly at right angles, and to the north of the passenger-house, the north-west corner of the passenger-house being very near Main street. The accident occurred on track marked "No. 3." The engine and tender were standing on this track near the east side of Park avenue, with the engine facing east. Plaintiff's place of work was in the north-western part of the city. His home was south upon Park avenue. The

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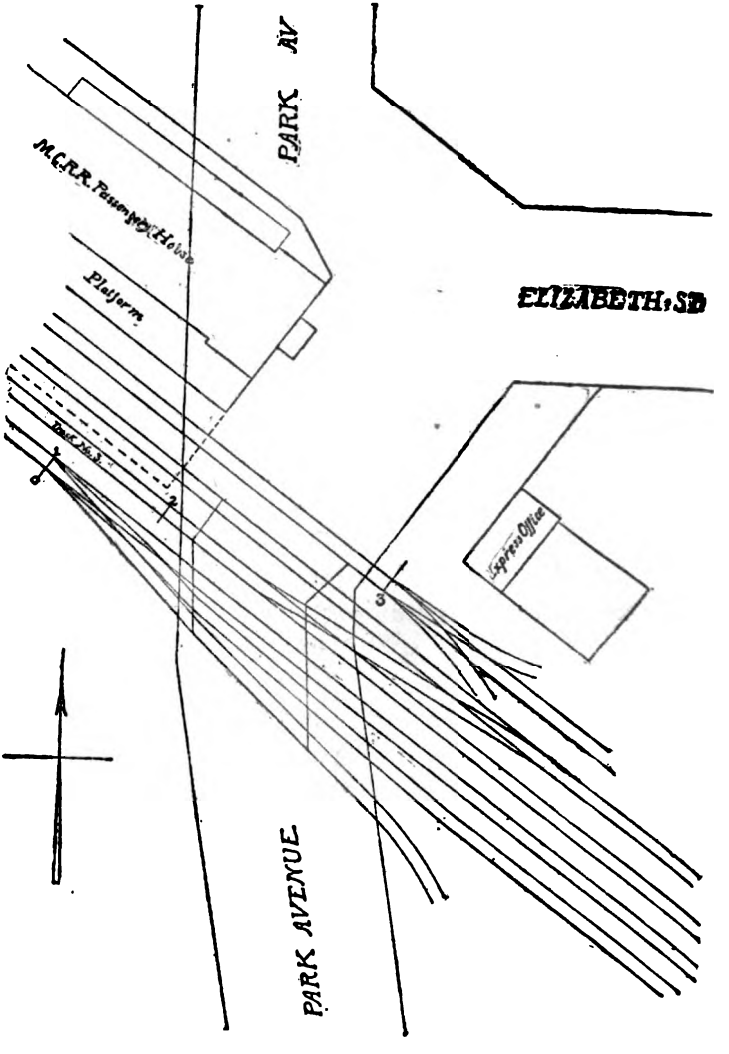

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course he took on this morning was not the most direct from his home to his work, nor the one he usually took. He approached the crossing on the west side of the avenue. As he approached the track, he inclined to the right, and testifies that he was near the center of the avenue when he reached track No. 3; his intention then being to go around the passenger-house on Park avenue, north to Main street. He then changed his mind, and concluded to go to the platform of the passenger-house, across the company's grounds, and reach Main street at the north-west end of the depot. He did not go from that point directly across the tracks to the platform, but turned his back to the tender, and walked in the center of track No. 3 to the west. He heard no bell or whistle. He had taken but two or three steps when the tender approached him. He heard the noise, looked back, and, seeing it very near him, in his confusion jumped first to one side and then to the other, when he was struck. Such, in brief, is his statement of the manner in which the accident occurred. He had lived in Jackson about two months, and had crossed these tracks on Park avenue several times, and had daily crossed the railroad for a long time, either there or elsewhere. Once he had jumped onto a train near the Michigan Southern depot, and was driven off. The case is of sufficient importance to quote some of his testimony.

On direct examination he testified:

"Was going to work in the morning, and cut across the track. First I was going around the depot, then I made my mind up and went towards the platform. That engine was standing on the east side of the crossing. I was going west, and I kept right on going west, and the engine started off. I didn't hear it coming, and as soon as I heard it rattle I looked around, and she was right up to me, about two or three feet from me. I made a jump, but could not get off. She caught me on the heel, and throwed me down, and dragged me quite a ways."

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On cross-examination he testified as follows:

"*Q.* If I understand you, you walked right between those rails?

"*A.* Yes, sir.

"*Q.* Then you were not going towards the depot platform, was you?

"*A.* Yes, sir.

"*Q.* You could not be going towards the depot platform and keep on between the rails, could you?

"*A.* Yes, I could.

"*Q.* The track didn't run up to the platform?

"*A.* It runs towards the platform up that far, and then I cross over.

"*Q.* Isn't it a fact that you started to walk down the track to go out to Main street?

"*A.* I started on that way, but I made up my mind I was going to go to the platform.

"*Q.* You had not steered directly towards the platform, had you?

"*A.* No, sir.

"*Q.* But walked right along the track?

"*A.* Yes, sir.

"*Q.* West? And this engine right behind you?

"*A.* Yes, sir.

* * * *

"*Q.* You expected when you turned to go right down across the railroad grounds to Main street, did you?

"*A.* I expected to go to the platform, and on the platform to Main street.

"*Q.* You were not going to the depot on any business that you had with the road?

"*A.* No.

"*Q.* You had stopped walking along the street?

"*A.* No, sir.

"*Q.* And was going between the rails?

"*A.* Yes, sir.

"*Q.* Then you had stopped crossing the railroad along with the street? You had stopped going that way, the same way the street goes, and had turned to go the same way the tracks were?

"*A.* That is all; I turned.

"*Q.* And had gone how far on your road along between the rails when you heard the engine just behind you?

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"*A.* About two or three steps.

* * * *

"*Q.* Tell me, if you will, what made you turn your back to an engine, and walk right along between the rails of the same track that the engine was standing on?

"*A.* I don't know.

"*Q.* You knew if the engine did start up you would have to get out of those tracks or be hurt, didn't you?

"*A.* I did not hear it until it got up to me.

"*Q. You knew that an engine standing there that morning was liable to start up at any time, didn't you?*

"*A. Yes, sir.*

* * * *

"*Q.* You turned your back toward the engine, and walked west between the rails?

"*A.* Yes, sir.

"*Q.* But before you turned your back to the engine you saw the engine standing there?

"*A.* Yes, sir.

"*Q.* How long was it before you turned round to go there that you saw it last?

"*A.* I don't know.

"*Q.* Where was you the last time you saw the engine before you heard it come up behind you?

"*A.* I was not in the center of the street. I was about on the side where the sidewalks cross.

"*Q.* Which way was you going?

"*A.* West.

"*Q.* Going west?

"*A.* Yes, sir.

"*Q.* The last time you saw the engine before you heard it close up to you?

"*A.* Yes, sir.

"*Q.* That was after you turned to go west?

"*A.* Yes, sir.

* * * *

"*Q.* How far south of the track the engine stood on was you the last time you saw it before you turned to go towards the platform or to go west?

"*A.* About 10 or 12 feet from the engine. I was southwest from the engine.

"*Q.* And where was you the last time you saw it before you turned?

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"*A.* I was on the railroad track then.
"*Q.* On this same track that you got hurt on?
"*A.* I don't know.

* * * *

"*Q.* Over in Germany, where you lived, did they have a law that people must not walk on the railroad?
"*A.* Yes, sir.

* * * *

"*Q.* How did you expect, if you were walking between those rails, you were ever going to get onto the depot platform?
"*A.* I walked up so far, and then crossed over.
"*Q. Why didn't you go right towards the depot platform across the tracks, instead of walking between the rails?*
"*A. I don't know.*"
On redirect examination, he testified that he was walking *right straight between the rails.*

The engineer and fireman were upon the engine, one of whom plaintiff saw. The plaintiff's case was unsupported by any other evidence, except that of two witnesses who testified only in regard to a failure to ring the bell or blow the whistle. Three witnesses, two of whom are not in the employ of the defendant, testified that the plaintiff was trying to catch on the engine while it was in motion, and that he fell and was injured in so doing. Three others testified that plaintiff told them that he was injured while attempting to get upon the engine. This is denied by the plaintiff, and, while this would be a proper question for the determination of a jury, still I deem it proper to refer to it as explaining the plaintiff's actions and some of his testimony, and to show the weakness of his case, which the court took from the jury.

1. I think this case is clearly ruled by *Kelly v. Railroad Co.*, 65 Mich. 186. I quote with approval the language of my Brother CHAMPLIN in that case:

"The right of the public in a highway crossing a railroad is simply a right of passage across the railroad. The public, and no individual thereof, have the right to

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commit a trespass upon the railroad company's property within the limits of the highway crossing. He cannot interfere with the rails or grounds, or obstruct the tracks, simply because it is in the highway, without committing a trespass. The highway crossing is for the purpose of passage from one side of the railroad to the other, and any other use thereof, whether between the tracks or between the rails, is unwarranted. The right of way and of use, when not used or required for the purpose of passage across the railroad, belongs to the railroad company, and may be used by it in the same manner as if no street crossing was there."

The theory of the declaration in the present case is that plaintiff was walking along the public highway across the defendant's tracks for passage in the usual manner, not that he was passing across the highway along the tracks. Kelly had commenced his trespass before he reached the highway, while Fehnrich commenced his upon the highway. Granting that the plaintiff had the right to use any part of this highway for the purpose of passage across the defendant's tracks, and that he was in the exercise of that right up to the time he reached the center, it does not follow that he had the right to then turn and pass along the company's tracks and across the highway, not for the purpose of going directly into another highway, but of entering upon the company's grounds, where he had no business, and at that time no right.

The moment a traveler ceases to use the highway across a railroad for the legitimate purpose of passage in the usual manner, and walks along the tracks for his own convenience, that moment he becomes a trespasser. And especially must this be true when he so uses them for the purpose of passage over the railroad grounds, where he has no right of passage. In so doing it is too clear for argument that he is not using the highway for the

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legitimate purpose of crossing. What difference can it possibly make where the trespass began?

2. Plaintiff by his own gross negligence contributed to the injury. He did not lack in age, experience, capacity, knowledge, or opportunity for observation. The danger was as apparent to him as it would have been to an adult. As stated in *Bird v. Railroad Co.*, 86 Mich. 79, "a train standing upon a highway, with an engine attached, is of itself notice of danger." When one is old enough to see and comprehend the danger, he must be charged with contributory negligence when he deliberately walks into the dangerous place. Plaintiff admits that he saw, knew, and comprehended the danger. The facts are admitted, and no question was left for the determination of the jury. The learned circuit judge said upon the trial:

"Plaintiff saw this engine there, with one man in it. He stepped up to the track, and deliberately stepped between the rails upon which that engine stood, walking west. * * * I find it impossible for me to state a case to the jury, from his standpoint, upon the question of whether or not he contributed materially to the injury by his own carelessness, as I can find and think of no language appropriate to express a case on which I think the jury would be justified in rendering a verdict in his favor."

It would have been impossible, in my judgment, for 12 honest jurors to have reached any other conclusion, and in such case the question is one of law, for the court, and not of fact, for the jury.

Judgment should be affirmed.

CHAMPLIN, C. J., concurred with GRANT, J.

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CHARLES H. PLUMMER v. THE TOWNSHIP OF EDWARDS, AND SAME v. THE TOWNSHIP OF OGEMAW.

[Two cases.]

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Board of supervisors—Salary of sheriff.

A board of supervisors has no power to allow the sheriff an annual salary for services "as jailer," including those for which the statute has provided fixed fees.

Error to Ogemaw. (Simpson, J.) Argued June 12, 1891. Decided October 9, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinions.

Tarsney & Weadock, for appellant.

Markey & Hall, for defendants.

MORSE, J. In these two cases I think the county tax was illegal, because of the action of the board of supervisors in voting a salary to the sheriff "as jailer" of $500 per annum. How. Stat. § 9055, gives this officer 35 cents for the commitment of every person to the county jail, and the same sum for each discharge therefrom, and for taking a prisoner before a court for examination or to jail, 15 cents; and, after enumerating the fees for other services, it provides:

"For other services not herein specially provided for, such sums as may be allowed by the board of supervisors."

This clause of the statute does not, in my opinion, authorize the board of supervisors to vote a lump salary to the sheriff as jailer for the year. The evident intent

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is that, if the sheriff performs services not specially provided for in the statute, he shall present his claim for such services, after they are rendered, to the board, who shall, upon investigation of the same, allow such compensation as to them may seem just and proper.

The resolution of the supervisors fixing this salary did not specify what it was for, except in this general way, "as jailer." This would seem to include all his services as jailer, if any, and would embrace those services for which the statute has fixed the fees. The sheriff must be confined to his fees as fixed by statute. *Burk v. Webb*, 32 Mich. 173; *Clark v. Supervisors*, 38 Id. 658; *Peck v. Bank*, 51 Id. 353; *Hewitt v. White*, 78 Id. 117. If the supervisors could legally vote $500, they could vote any sum, which is not the evident purpose of the statutes of this State. I know of no law recognizing that the sheriff is a salaried officer, or that authorizes the voting of any sum of money to him as a salary for any services. For such a county as Ogemaw the amount voted is a large one; and there is nothing in the resolution preventing him from receiving all the ordinary jail fees in addition, besides his expense in boarding the inmates of the jail. In the same resolution they fixed the clerk's fees at $725, but were careful to provide that he should no longer receive the entry fees for himself, as had been before that permitted; and also that he should thereafter be allowed no *per diem* fees while attending the sessions of the board of supervisors. But the sheriff is in no wise restricted or deprived of any of his usual fees. The circuit judge should have instructed the jury that so much of the county tax was void as was the plaintiff's proportion of the $500.

For this error the judgments in both cases must be reversed, and a new trial granted, with costs of this Court to plaintiff.

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CHAMPLIN, C. J., and GRANT, J., concurred with MORSE, J.

MCGRATH, J. (*dissenting*). Plaintiff sues to recover taxes for the year 1889, assessed upon real estate, situated in defendant township, and paid by him under protest.

1. It is claimed by plaintiff that the township tax was illegal, because it included the sum of $1,350 for the payment of maturing township bonds, and that the inclusion of this amount was not authorized. The record of the township meeting, held April 1, 1889, shows that a vote was had, and that a majority of the electors voted to pay the bond of the township when it became due. The township board, at a meeting held June 24, 1889, adopted the following:

"*Whereas*, the electors of the township of Edwards, at the annual township meeting held therein on the first day of April, 1889, voted to pay the bond or bonds held against the township of Edwards, coming due January 8, 1890, and failed to vote any certain amount to pay the said bond or bonds: therefore, be it—

"*Resolved*, by the township board of the township of Edwards, that the sum of $1,350 be spread as a special tax on the assessment roll of 1889, for the payment of the bond or bonds."

It is insisted that the action taken at the annual meeting is invalid, because it does not describe the bond, when it was due, the amount, the purpose for which it was given, its rate of interest, nor anything by which the indebtedness may be identified, and that the township board at its meeting exceeded its authority under section 750, How. Stat., as amended in 1887.[1] Section 750, however, refers only to ordinary township expenses, and not to maturing bonded indebtedness. No claim is made

[1] See Act No. 60.

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but that there was a valid existing and maturing bonded indebtedness of the township of the amount named. The duty of the township to provide for its maturing indebtedness is imperative. *McArthur v. Duncan Tp.*, 34 Mich. 27. The bonds were fixed charges against the township, certain in amount, and a liquidated claim. No vote of the electors on the question of raising the money to meet them was necessary. *Newaygo Co. Manfg. Co. v. Echtinaw*, 81 Mich. 416. It was the duty of the township board to anticipate the payment of the bonds, and to include the amount in the assessment roll.

2. It is alleged that the county tax is illegal, for the reason that it included a salary of $500 per annum, voted by the board of supervisors to the sheriff as jailer.

The sheriff is by law made custodian of the jail, and of the prisoners confined therein, and is made responsible for the keeping of the prisoners, whether by himself or deputy. How. Stat. § 585. No allowance is made by statute for fuel, lighting, board, or care of prisoners, and the statute expressly provides for allowance by the board of supervisors for services and expenses for which no provision is made. Id. § 9055. It will not be presumed that the board has undertaken to substitute this salary for compensation fixed by law, but it will be assumed that this allowance is intended to cover necessary and actual expenses and services for which no fees are provided by the statute. Compensation for this class of services and expenses cannot be calculated upon a per prisoner basis, especially in sparsely settled counties, and, inasmuch as the jailer with his family usually resides at the jail, the entire expense may not be considered a proper charge against the county; hence the expense must be apportioned, and the amount estimated, whether fixed in advance or otherwise.

The Constitution (article 10, § 10) gives to boards

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of supervisors the exclusive power not only to "adjust claims," but to "fix the compensation for all services;" and the statute (section 9055) which provides that the sheriff shall be entitled, "for other services not specifically provided for, to such sums as may be allowed by the board of supervisors," does not, in my opinion, restrict the board to the mere auditing of accounts. The statutes are to be examined for some provision making compensation for these specific services, rather than for authority to fix a compensation for them. Ample authority is conferred by the Constitution. The statute makes no provision for the compensation to be paid to deputy-sheriffs, yet it is a matter of common knowledge that deputy-sheriffs, for court service, and for other special services, receive a fixed compensation. In some cases, keepers, engineers, and even cooks are employed for jail service at salaries fixed by the board of supervisors. Prisoners are, in many cases, fed at a regular *per diem*, fixed in advance by the board of supervisors. If boards of supervisors have power to fix the compensation for these services severally, have they not the right to group with them other items, and fix the compensation for them in the aggregate? If the authority of boards of supervisors in this respect is limited to the allowance of claims, then they have no power to fix the salaries of keepers, etc., and none to fix the *per diem* for feeding prisoners.

There is a clear distinction between the present case and that of *Hewitt v. White*, 78 Mich. 117, for there the board fixed a salary in lieu of fees fixed by the statute, while here the salary is intended to cover services and expenses for which no definite compensation is provided by statute. In other words, the salary here is confined to services that might be contracted for, and not to

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services which the Legislature has subjected to a fixed compensation.

The court below properly directed a verdict for defendant, and the judgment should be affirmed, with costs.

LONG, J., concurred with MCGRATH, J.

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ALICE B. CANFIELD v. THE GREAT CAMP OF THE KNIGHTS OF THE MACCABEES FOR THE STATE OF MICHIGAN.

Mutual benefit associations—Rejection of claim—Bar to action at law.

A provision in the laws of a mutual benefit association that the decision of a tribunal created by the constitution to pass upon death claims shall be final, and bar any suit at law or in equity therefor, is sustained, as within the ruling in *Van Poucke v. Society*, 63 Mich. 378.

Error to Macomb. (Canfield, J.) Argued June 18 and 19, 1891. Decided October 9, 1891.

Assumpsit. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

Eldredge & Spier, for appellant.

Markey & Hall, for defendant.

GRANT, J. This case was tried by the court, and the finding contains the following material facts:

Defendant is a mutual benefit association incorporated

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under Act No. 89, Laws of 1883 (3 How. Stat. chap. 163), for the improvement morally, socially, and intellectually of its members, and for the purpose of establishing a benefit fund, from which shall be paid a certain sum to the member, or his widow, or certain other relatives, as he may direct, and as the endowment laws of the order provide. Its constitution provides for a Great Camp, composed of certain officers and one representative from each of the subordinate tents in the State. This Great Camp meets annually, and its members are selected annually. Three of the principal officers constitute the executive committee. Article 18, § 2, of its laws reads as follows:

"The executive committee shall have power to pass on all death claims, and, if in their judgment any such claim is not on its face a valid one, they shall notify the beneficiary or beneficiaries of the deceased members thereof, and give them or their attorneys an opportunity to appear before such committee within sixty days thereafter, and present such evidence as they may have to establish the justness or validity of such claim, and the said committee shall try, hear, and decide upon the justness or validity of such claim, and such decision shall be binding upon such claimant, unless an appeal is taken to the Great Camp. The notice of the appeal from the decision of the said committee must be filed with the Great Record Keeper within sixty days thereafter. The decision of the Great Camp, in all such cases, shall be final, and no suit in law or equity shall be commenced or maintained by any member or beneficiary."

Plaintiff's husband, now deceased, became a member of the defendant, and received what is termed a "half endowment certificate," which entitled him to receive one assessment on the membership, not exceeding $1,000, as a benefit to his wife, upon satisfactory proof of his death, and the surrender of the certificate, provided he shall have, in every particular, complied with all the rules and regulations of the order. Upon his death plaintiff pre-

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sented her claim to the committee, which decided against it on the ground that at the time of his death he was not a member in good standing, but had been duly and regularly suspended therefrom, in accordance with the rules and regulations thereof. She then appealed to the Great Camp, which also disallowed the claim, after a full examination and hearing. She then brought this suit, and judgment was rendered therein against her.

It is claimed on behalf of plaintiff that the provision above quoted, which makes the decision of the Great Camp final, is contrary to public policy, and void, in that it ousts the court of jurisdiction. No charge is made that either the committee or the Great Camp acted fraudulently, or in any manner contrary to the rules and regulations of the order.

I am unable to see any difference between the present case and that of *Van Poucke v. Society*, 63 Mich. 378. These organizations are purely voluntary, and it may well be considered by their members important that claims of this character should be determined by methods more inexpensive than resorts to the courts. This reason is well expressed by my Brother CHAMPLIN in the case above cited.

Plaintiff seeks to maintain a distinction between that case and the present one, in that the plaintiff there was himself a member claiming for "sick benefits," while the plaintiff here is not a member, and had no voice in the selection of members of the tribunal. Her right depends solely upon the voluntary act of her husband in becoming a member. Her right to receive the benefit depended upon his complying with the constitution and rules, to which he assented and which became a part of his contract. I can see no reason why a different rule should apply to plaintiff than to a member making a claim for benefits. Similar provisions have been sustained by the

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courts. *Anacosta Tribe of Red Men v. Murbach*, 13 Md. 91; *Toram v. Association*, 4 Penn. St. 519; *Society v. Vandyke*, 2 Whart. 309; *Woolsey v. Independent Order of Odd Fellows*, 61 Iowa, 492 (16 N. W. Rep. 576); *Rood v. Association*, 31 Fed. Rep. 62.

Judgment affirmed.

CHAMPLIN, C. J., MORSE and MCGRATH, JJ., concurred. LONG, J., did not sit.

FREDERICK H. HITCHCOCK v. SAMUEL H. DAVIS, DAVID W. DAVIS, AND THOMAS B. RAYL.

[See 75 Mich. 1.]

Attorney and client—Agreement for compensation—Settlement—Receipt—Evidence—Burden of proof—Charge to jury.

An attorney who had agreed with clients, in consideration of the receipt of a share of certain claims when collected, to render certain professional services without charge, commenced a suit prior to such collection to recover for professional services, but without referring in his declaration to said agreement, and on a settlement of the suit gave a receipt for a specified sum, "in full of all claims in the above-entitled cause *and of all accounts*." There had been some correspondence between the parties prior to such settlement, and from which it appeared that the attorney supposed that his right to a share of the uncollected claim under said agreement could not be enforced, because of the inability of his clients to collect said claim, while they considered the claim as still in effect, and that the attorney was entitled to the agreed share of the same in case it was collected. After the death of the attorney a suit was brought to recover said claim, in which the plaintiffs recov-

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ered a final judgment (see *Davis v. Hammond*, 75 Mich. 1), after which the administratrix of the attorney's estate assigned the agreement to a third person, and the assignee brought suit to recover the share of the claim agreed to be paid to the attorney. On the trial the defendants introduced the receipt as evidence of a settlement of the claim sued upon with the attorney in his life-time, and also contended that he neglected and refused to render the services provided for in the agreement, notice of which defenses was given with defendants' plea of the general issue. And in reversing a judgment in favor of the defendants the Court hold:

a—That the burden of proof was upon the defendants to establish the alleged settlement; and that, as soon as any evidence was introduced by the defendants tending to establish the second defense, the burden of proof was upon the plaintiff to show that the attorney performed his agreement, or was ready and willing to do so.

b—That the receipt, standing alone, would hardly warrant a court or jury in finding that it was given on a settlement of the claim sued upon, but that it was for the jury to determine from the receipt, and the facts and circumstances attending its execution, what was settled by it; and that whether or not the words "all accounts" would embrace said claim was not so certain as to create any legal presumption for or against such settlement.

c—The court erred in referring in his charge to the absence of the assignee at the trial, he having no knowledge of the facts in issue, and it being immaterial whether he was present or not, as long as attorneys were present who were fully authorized to represent him in the conduct of the trial.

Error to Wayne. (Brevoort, J.) Argued June 19, 1891. Decided October 9, 1891.

Assumpsit. Plaintiff brings error. Reversed. The facts are stated in the opinion.

Charles Flowers, for appellant.

Corliss, Andrus & Leete, for defendants.

MORSE, J. The plaintiff, as assignee of Theodore

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Romeyn, deceased, brought suit in the Wayne circuit court based upon the following contract:[1]

"It is agreed between Samuel H. Davis, Thomas B. Rayl, and David W Davis, of the first part (jointly and severally), and Theodore Romeyn, of the second part, as follows:

"*First.* The contracts of the 2d September, 1879, and all obligations resting upon or springing from them, are relinquished.

"*Second.* The said first parties having settled their difference with George H. Hammond, of Detroit, and he having agreed to pay to them certain sums on conditions and at the times specified in a certain contract between them and him dated the 18th September, 1880, the said first parties (jointly and severally) agree with said Romeyn to pay to him, for value received, one-fourth part of whatever said Hammond shall pay to them, being twenty thousand dollars in hand, and ten thousand dollars when the validity of certain patents for refrigerator-cars shall be established by the judgment or decree of the circuit court of the United States for the first circuit of Boston, Massachusetts, as is more fully set forth in the agreements between the parties of the first part hereto and said Hammond.

"Whatever said first parties may receive from said Hammond for damages recovered in his name against the infringers of said patents for preserving and transporting meats and fish and other perishable articles shall be divided equally with said Romeyn.

"Said Romeyn, on his part, agrees to give his professional services, including advice and the trial of matters in court, in any suits or other proceedings to establish the validity of said patents, or to recover damages for their infringement, without any charge against the parties of the first part or said Hammond, but he is not bound to leave for such purposes the city of Detroit.

"The patents referred to are those of the Davis refrigerator boxes and cars, dated 16th June, 1868, to William Davis, and re-issued on 15th September, to him

[1] Theodore Romeyn died July 22, 1885, and January 20, 1890, the administratrix of his estate, with the consent of the heirs and pursuant to an order of the probate court of Wayne county, assigned the contract to the plaintiff.

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jointly with Samuel H. Davis and Thomas B. Rayl, and the patent to David W. Davis for improvement in refrigerators, number 220,915, dated on the 28th October, 1879.

"[Signed] THEODORE ROMEYN.
"[Signed] S. H. DAVIS,
"By His Attorney in Fact,
THOMAS B. RAYL.
"THOMAS B. RAYL.
"DAVID W. DAVIS."

—And claimed under it one-fourth of the judgment obtained by defendants against the estate of George H. Hammond in the Wayne circuit court, and affirmed in the Supreme Court (see *Davis v. Hammond*, 75 Mich. 1); the full amount of said judgment amounting to $15,819.

The defendants pleaded the general issue, and gave notice that they would prove a settlement with said Romeyn in his life-time in full satisfaction and discharge of his claims under said contract, and, further, that he neglected and refused to give his professional services, and that there was an entire want and failure of consideration on the part of said Romeyn for said contract.

The defendants had verdict and judgment on a trial in the court below. No exception is taken to the admission or rejection of evidence, but a large number of errors are assigned upon the charge of the court to the jury.

It is contended by plaintiff's counsel that his case was *prima facie* established by showing the contract, and the payment to defendants of the judgment, which was based on the fact that Hammond settled the suit in the United States court at Boston referred to in the agreement sued upon. The agreement, in thus referring to the suit in Boston, also refers to an agreement between the defendants and Hammond. That agreement provided, among other things, that Hammond should pay the defendants $10,000 in case he should recover in the Boston suit, or

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should make a settlement of the matters in said suit without proceeding to a final decree. The judgment obtained by the defendants against the Hammond estate was grounded upon such settlement, which was established in their suit against the Hammond estate upon their contract with Hammond. The court instructed the jury that the burden of proof was upon the plaintiff to make out his case. The plaintiff's counsel insists that the burden of proof was upon the defendants to establish a settlement with Romeyn of his claim under this contract. This is true, as it was a matter strictly of defense, and must be shown by the defendants. But under the second defense, that Romeyn had violated his part of the contract by neglecting or refusing to perform the services agreed to be given in the contract, although this was made a matter of defense by the plea and notice of the defendants, still, as soon as any evidence was introduced tending to show such neglect or refusal, the burden of proof was upon the plaintiff to show that Romeyn performed his contract, or stood always willing and ready to do so. The court erred in not properly separating these two defenses, and applying the rule as to the burden of proof to each of them.

The fourth request of plaintiff's counsel was as follows:

"The evidence shows that the said Romeyn commenced a suit against the defendants in this case in the superior court of Detroit, which suit was settled and discontinued. The receipt offered in evidence purports to be a settlement of all matters embraced in that suit, and, unless said receipt expressly shows a settlement of matters other than those embraced in said suit, it cannot be construed to be a settlement of Mr. Romeyn's claim under this contract, there being no evidence in this case to show that his claim under this contract was embraced in that suit. The claim under said contract had not accrued at the time of the settlement and discontinuance of said suit, and did not accrue until the payment of the ten

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thousand dollars provided for in said contract, by the said Hammond or his representatives, namely, after final judgment was obtained against said Hammond or his estate in this court, and until said judgment was satisfied."

The court stopped at the word "contract," and refused to give the balance of the request, commencing, "there being no evidence in this case to show," etc.

The receipt which was put in evidence, after being entitled in the cause, reads as follows:

"Received, Detroit, June 8, 1885, of Thomas B. Rayl and Samuel H. Davis, per C. I. Walker, their attorney, ninety-three ($93) dollars, in full of all claims in the above-entitled cause and of all accounts. They have also paid seven ($7) dollars towards the costs in said suit. Said suit is to be discontinued without costs to either party.

"(Sd.) THEODORE ROMEYN,
"By JAMES W. ROMEYN,
"His Attorney in Fact.

"June 8, 1885.

"Received seven dollars for disbursements in above suit, and in settlement thereof, in addition to the above amount paid plaintiff in person.

"(Sd.) DICKINSON, THURBER & HOSMER,
"Plaintiff's attorneys.

"June 11, 1885."

Theodore Romeyn commenced the suit in which this receipt was given against these defendants February 26, 1885, filing his declaration in *assumpsit* for professional services. A bill of particulars of his demand was also filed, but could not be found on this trial. The declaration makes no reference to the contract upon which the present suit is based. It is admitted that Romeyn received his one-fourth of the $20,000. The plaintiff's counsel contends that the words, "and of all accounts," cannot refer to Romeyn's share or claim to a share of the $10,000, because at that time no money had been received by defendants from Hammond, and there seemed

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but little likelihood of anything being obtained from Hammond on account of the Boston suit; that the suit in which defendants recovered this $10,000 and interest was not commenced until August 27, 1886, over a year after Romeyn's death, which occurred July 22, 1885, and, if it had been intended to settle this claim, the contract would have been referred to in the receipt. We think the receipt itself, without any other testimony, would hardly warrant a court or jury in finding that it settled this claim upon the contract. But there is some correspondence which is significant. August 25, 1884, Romeyn wrote the defendants the following letter:

"DETROIT, August 25, 1884.

"*To David W. Davis and Samuel H. Davis and Thomas B. Rayl:*

"I have an unsettled claim against you for legal services in the suit of David W. Davis, Samuel H. Davis, Thomas B. Rayl, and George H. Hammond against Minna Alpern, William B. Isbell, and Emma J. Merrill in the Wayne circuit court. The suit which Mr. Hammond was prosecuting in the United States circuit court in Boston was dismissed for want of prosecution, and under such circumstances as would probably exempt Mr. Hammond from every liability upon his contract to pay $10,000, though Mr. Trowbridge and Mr. Kane, counsel for David W. Davis, do not concede this; as Mr. Hammond, by the terms of his contract, was only to pay in case he got judgment in the court in Boston, or if he 'should make settlement of the matters in said suit without proceeding to final decree.'

"Hammond's counsel here say that he was forced to buy out Mr. Isbell, to whom Alpern had made some conveyance, and that you, S. H. Davis and D. W. Davis, refused to pay what was necessary to pay Isbell, and that the suit in Boston was dismissed against the wishes and consent of Hammond and his counsel for want of prosecution, and that Hammond was forced to this step in consequence of the title that had been given to Alpern.

"I put my claim for services and disbursements, for clerical work and court fees, and so forth, at a very low figure, namely, five hundred dollars.

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"In speaking to Judge Walker about it, he said that he had no instructions or authority, and that it was best to address you directly.

"On December 29, 1882, I wrote to yourself, Mr. Rayl, and the two Davises, upon the subject of my fees in this matter, but nothing has been done towards paying me. I therefore give notice that, unless I hear from you within a reasonable time concerning the settlement of this matter, I will be compelled to take legal proceedings against you, although I should very much prefer an arrangement without suit. I said to Judge Walker this morning that I was entirely willing to submit my claim to him and abide by his decision. He declined to accept the responsibility, and said I had better address you. I am willing to submit the matter to arbitration. Let me hear from you soon.

"Yours truly, THEODORE ROMEYN."

To which David W. Davis replied as follows:

"CLEVELAND, August 27, 1884.

"THEODORE ROMEYN,—

"*Dear Sir:* Yours of August 25, 1884, inclosing a copy of letter to T. B. Rayl and S. H. Davis, received. I think you presume too much in this note, and that you have no claim whatever for any legal services in the Hammond matter. The arrangements that I made with you in regard to the suit settlements against Hammond were all settled with you *except your interest in the $10,000 agreement of Hammond, of which you will receive your share just as soon as it can be collected.* * * * *

"Respectfully, D. W. DAVIS."

It is evident from these letters that Romeyn supposed his claim for one-fourth of the $10,000 could not be enforced, because the defendants would not be able to recover it from Hammond, while Davis considered the contract in force, and that Romeyn was entitled to such share in case the $10,000 was ever collected. The letter shows that Romeyn at that time was claiming pay outside of the contract, for services rendered in the Wayne circuit court; and it is claimed by the defendants on this trial that this letter, and the suit brought by Romeyn

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against them subsequently, is evidence that Romeyn failed to perform his contract, and consequently the plaintiff cannot recover in this case, because the suit brought by him was for the services mentioned in Romeyn's letter, and such services under the contract were to be furnished free, in consideration of the contract. We shall refer to this in another part of this opinion.

It is strenuously insisted by plaintiff's counsel that there is not a *scintilla* of evidence to show that the settlement did include this claim. Hon. C. I. Walker was the attorney of the defendants in the suit of Romeyn against them, and he did all the negotiating of the settlement in their behalf. Dickinson, Thurber & Hosmer were Romeyn's attorneys. Mr. Walker testified on direct examination that the action was for services rendered by Romeyn in a professional character. He understood the receipt to have been given in settlement of all claims on the part of Romeyn against the defendants. "The paper was drawn for it." On cross-examination, he stated that the suit was not brought on any contract, and did not recollect that the bill of particulars referred to any contract. "I only know it was for professional services against these gentlemen."

"*Q.* You knew, did you not, of the existence of this contract between Romeyn and Davis, by which he was to get one-fourth of the $10,000 of certain moneys which were to come from George H. Hammond?

"*A.* I knew there had been a good many complications growing out of that matter; while I knew something about them generally, I was not familiar with all the details.

"*Q.* You knew at that time that the matter with reference to Hammond had not been settled with the Davises, didn't you?

"*A.* No, sir; I clearly understood that Mr. Romeyn had no further claims against these defendants growing out of that.

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"*Q.* Growing out of that contract?

"*A.* Yes, sir.

"*Q.* At the time this settlement was made, was that contract delivered up to be canceled?

"*A.* I don't know.

"*Q.* It wasn't referred to?

"*A.* Not specially, no, sir; but this was a settlement of all claims he had against these defendants. That I have a very clear recollection of.

"*Q.* You mean, don't you, that it was a settlement of all matters in that suit?

"*A.* I understood that it was a settlement of all matters between them in relation to the services.

"*Q.* It could not have been a settlement of anything which was still outstanding and hadn't been determined?

"*A.* I don't know anything about that.

* * * *

"*Q.* If it had been the intention of the parties in settling this suit to have settled so important a matter as one-fourth interest in a $10,000 contract, would not they have drawn that up in the receipt?

"*A.* That I don't know.

"*Q.* In settling so important a matter as a fourth interest in a $10,000 contract, if you intended to settle anything else except this suit, would it not have been natural for you to have included that in the receipt?

"*A.* The idea was that he had no claim against these defendants growing out of that $10,000 suit, and therefore there was no need of embracing that.

"*Q.* Your idea was based upon the fact that this matter between Hammond and them was still undetermined?

"*A.* I supposed there was something undetermined, but I had no idea that Mr. Romeyn had a claim against these defendants growing out of that. That was my idea.

"*Q.* At that time these defendants had not received any of this money, had they?

"*A.* I don't know anything about that.

"*Q.* Don't you know, as a matter of fact, that a suit was brought by them a long time after this settlement to recover this money?

"*A.* I had nothing to do with that. I don't know anything about that except what I have heard.

"*Q.* Except what you have heard?

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"*A.* I have heard of some suit, whether brought by these defendants or not I don't know.

"*Court:* Do you refer to the so-called 'Boston suit?'

"*A.* No, I mean to the suit in this court, brought by the Davises against Hammond, on which they recovered on this $10,000 contract.

"*Q.* But at the time you made this settlement, that matter was still undetermined.

"*A.* I suppose it was.

"*Mr. Corliss:* As far as Mr. Romeyn was concerned, you understood that their relations and contracts were at an end?

"*A.* I understood that everything was at an end between them. I mean Mr. Romeyn's claim for professional services and claims against these defendants was settled. That was all.

"*Mr. Flowers:* That is what you understood? It was simply to settle all claims he had for professional services against them?

"*A.* Well, professional and others,—settling the whole matter, as I understood it. I didn't know, perhaps, that he had any claim growing out of a special contract. I cannot say as to that. But my understanding was that we were settling everything that Mr. Romeyn had against these defendants. That is my idea; but I did not know about all those contracts.

"*Q.* You didn't know anything about the $10,000 contract, or anything of that kind?

"*A.* I may have known it in a general way, that there were some contracts of that sort, but I was not familiar with it.

"*Q.* You didn't think you were settling any claim that had not matured did you?

"*A.* No, sir; I didn't think anything about that. I did think they were settling all claims they had against these defendants."

Judge Hosmer, who acted as attorney for Mr. Romeyn, and drafted the declaration, had no recollection whether this claim was included in the settlement or not.

We think there was some evidence, though it may be slight, to go to the jury on this question. Mr. Romeyn evidently supposed that he had nothing to expect from

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this $10,000 agreement, and may have therefore been willing to settle everything in this receipt. His letter would seem to carry the idea that he expected nothing further under his agreement with defendants, and was therefore making this claim against them. If not, his reference to the Boston suit, and the fact that Hammond probably could not be held for the $10,000, would seem to have no relevancy to the main subject-matter and purpose of his letter. We can perceive no injury done to plaintiff by the refusal to give the whole of his fourth request.

The next question to be determined is whether there was any testimony warranting the jury in finding specially, as they did in answer to a special question, that James W. Romeyn had authority from his father to make such a settlement as defendants claim was made.

James W. Romeyn was a son of Theodore Romeyn, and was living in New York at the time of this trial. He has since died. The evidence shows that his father was in feeble health and confined to his house at the time James made this settlement and gave this receipt. The fact that the attorneys of Theodore Romeyn accepted the receipt as a valid settlement of the suit, and received part of the amount paid in such settlement, as evidenced by their receipt, goes very strongly to show that James was at least authorized to settle all matters involved in such suit. The testimony also shows on behalf of the plaintiff that at this time James was associated with his father in business. Mr. Walker testifies that in the settlement of the suit he consulted with James W. Romeyn and also with Theodore Romeyn; that James at the time was an attorney at law in practice with his father. The receipt was prepared in Walker's office, and is in the handwriting of one of his clerks. Judge Hosmer testified that he did not make the settle-

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ment on behalf of Mr. Romeyn; that Mr. Romeyn effected the settlement himself.

In the absence of any showing that James W. Romeyn was not fully authorized to act for his father in this settlement, we think the jury were justified in the presumption and finding that he had authority to settle all of the claims of his father against these defendants. The charge of the circuit judge in regard to such authority cannot be justly complained of, and he did not err in refusing to give plaintiff's request that James' authority must be shown by *direct* proof, or that the presumption would be that he only had authority to settle the matters involved in the suit.

The plaintiff also requested the court to instruct the jury as follows:

"The receipt offered in evidence by the defendants, given in the suit in the superior court, cannot be claimed to be a release of the claim of said Romeyn under this contract. The claim not having accrued at that time, if it was the intention of the parties to embrace it in the settlement it should have been expressly mentioned in said receipt, and, not being mentioned, the presumption is it was not intended to be included."

It was not error to refuse it. The receipt, using the words "of all accounts," might be claimed, under the facts and circumstances attending its execution, to be a release of all claims of Romeyn against defendants, whether resting upon express or implied contract. We are not prepared to say that there would be any presumption that this claim was not intended to be included in this receipt. It would depend upon what was meant by the words "of all accounts." If there was any legal presumption at all, we should be disposed to consider it in favor of the claim that everything between the parties was intended to be settled by it. The suit was evidently

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for professional services rendered in the Alpern case, mentioned in Romeyn's letter; and by the words "and of all accounts," after the words "in full of all claims in the above-entitled cause," it is very certain that it was intended to settle something further than the matters embraced in the suit. But, as we have before said, we think there was no presumption by which the matter could be determined from the receipt standing alone, but that it was for the jury to determine from the receipt, and the facts and circumstances attending its execution, what was settled by it. Whether or not the words "all accounts" would embrace the claim arising out of this contract is not so certain as to create any legal presumption one way or the other. It is an expression which needs explanation. If it had read "all claims and accounts," the presumption of settlement would have reached the claim of plaintiff; but by the use of the word "accounts" it may be asserted, with some show of reason, that an indebtedness then due, and not contingent, was intended; and, on the other hand, it may also, with the same show of reason, be contended that it was meant to cover all claims, contingent or otherwise.

The plaintiff also presented the following request:

"Under the contract in this case, the said Romeyn was under no obligation to commence proceedings against the said Hammond to enforce the collection of the $10,000 mentioned in the contract. The contract simply required him to render services in proceedings to establish the validity of the patents referred to in said contract, and there is no evidence in this case that he refused or neglected to render any services required of him under said contract."

The court gave all of said request, except the last clause, for which it substituted the following:

"And I leave it to you to say if there is any evidence

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in this case to show that he had refused and neglected to render any services required of him under said contract."

There was no error in this. It may be that Romeyn was under no obligation to commence proceedings against Hammond to collect the $10,000, but he agreed to "give his professional services, including advice and the trial of matters in court, in any suits or other proceedings to establish the validity of said patents, or to recover damages for their infringement, *without any charge*" against defendants. It appears very clearly from this record that the suit brought by these defendants and Hammond against Alpern and others in the Wayne circuit court came within the contract and agreement. If so, he refused to furnish his services free of charge to these defendants, and violated his contract, not only in planting his suit, but also in receiving money upon a settlement of such suit.

The court also refused to give the following request:

"The fact that said Romeyn expressed doubts as to the recovery of the claim of the defendants against said Hammond cuts no figure in this case. If, as a matter of fact, said claim was a good and valid claim, as it afterwards proved to be by the judgment of this court, and of the Supreme Court of this State, said Romeyn, or his representatives, are entitled to recover their share of it. The defendants cannot retain the fruits of their contract, and avoid paying the share to which said Romeyn was entitled because he expressed doubts as to their right to recover."

This was properly refused as it stood. The expression of doubts by Romeyn would not preclude his recovery, but part of this request was faulty. It did not follow, as the facts were disclosed, that, if the Davis claim against Hammond was good, the plaintiff was entitled to recover one-fourth of it.

We do not think there was any evidence in the case

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tending to show that Romeyn became the attorney of Hammond, and, in consequence thereof, advised defendants' attorneys that they had no right of action against said Hammond to recover upon the $10,000 contract, and the court was in error in instructing the jury that if they so found the plaintiff could not recover.

The court on his own motion said to the jury:

"There has been considerable comment by counsel both for the plaintiff and defendant upon the absence of Mr. Hitchcock. Mr. Hitchcock has not appeared here before the court, gentlemen of the jury, and it is for you to say from the evidence in this case what effect that shall have upon you in your deliberations, because it is one of the elements in controversy whether Mr. Hitchcock has interest enough in this case that he should attend court or not."

This reference to Mr. Hitchcock was error. It plainly appears in the case that he, being an assignee of the claim, had no knowledge whatever of the facts in issue; and it was in no wise material to the issue whether he was present in court or not, as long as attorneys were present, authorized to fully represent him in the conduct of the trial.

Complaint is also made of the language of the court in his reference to Mr. Buttrick in his instructions to the jury. Mr. Buttrick is a son-in-law of Theodore Romeyn, and took a very prominent part in the proceedings. He was one of the principal witnesses in the case for the plaintiff, and testified to a conversation with Judge Walker, which, if true, tended to impeach the latter's evidence. It was also shown by his own testimony that he had agreed with the plaintiff to assist him in collecting this claim, and, in pursuance of such agreement, had before the trial sought out both Judge Walker and Judge Hosmer, and had a conversation with each of them, making a memorandum of such talk as soon as he left

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them. Such memorandum did not agree with their testimony. The question of his interest in the claim was raised upon the trial, and he was recalled by the defendants and examined as to such interest. He denied that either he or his wife had any interest whatever in the suit. The court, speaking upon his own motion of Mr. Buttrick, said:

"Now, here, gentlemen, I think it is my duty to call your attention to the witness Buttrick. Mr. Buttrick has testified that he has no interest in the case; that his wife, who is the daughter of Mr. Romeyn, and that James Romeyn, who now resides in New York, and is his brother-in-law, have no interest in the case, they having assigned their interest to this plaintiff. It is for you to say, gentlemen, whether Mr. Buttrick has any interest in it or not; it is for you to say why he would be here, and, under the circumstances, why he has been, unless he had an interest. With that I have nothing whatever to do. It is for you, and you only, to say. You may give his presence here such consideration as you think it is entitled to."

Under the circumstances, I do not think this reference to Buttrick was error.

We have endeavored to discuss all the leading allegations of error in the proceedings below. Some of the minor assignments are disposed of by such discussion, and we find no other errors in the record.

The judgment is reversed, and a new trial granted, with costs of this Court to plaintiff.

The other Justices concurred.

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FRANK ZANGER v. THE DETROIT CITY RAILWAY COMPANY AND THE CITY OF DETROIT.

Street-railway companies—Obstruction to highway—Contributory negligence.

1. A street-railway company is not guilty of negligence in allowing material taken from between its rails while repairing its track to remain in the street along-side its track for a few hours (five or six in this case) in the day-time.
2. One who knows that a street-railway track is being repaired, and sees an obstruction in the street by reason of such repairs, and drives over the same on a trot, without any consideration that a high, loose box upon which he is sitting might be thereby thrown out of the wagon, is guilty of such contributory negligence as will bar a recovery for injuries thereby sustained.

Error to Wayne. (Reilly, J.) Argued June 20, 1891. Decided October 9, 1891.

Negligence case. Plaintiff brings error. Affirmed. The facts are stated in the opinion.

James H. Pound, for appellant, contended:

1. On the case as it stands, plaintiff was entitled to have a verdict directed in his favor, except as to an inquest of damages; citing *Bowen v. Railway Co.*, 54 Mich. 496; *Wallace v. Railway Co.*, 58 Id. 231; *Laughlin v. Railway Co.*, 62 Id. 220.
2. A question of negligence is a question of fact, as a general rule; citing *Railroad Co. v. Van Steinburg*, 17 Mich. 99; *Iron Co. v. Erickson*, 39 Id. 492; *LeBaron v. Joslin*, 41 Id. 313; and this, too, even where plaintiff's evidence tends to convict him of contributory negligence; citing *Flater v. Fey*, 70 Id. 644; and if the case is not free from doubt upon the facts, the question should be submitted to the jury; citing *Sheldon v. Railroad Co.*, 59 Mich. 172; *Mynning v. Railroad Co.*, Id. 257, 64 Id. 93; and the same rule applies where there is any evidence of negligence: citing *Macomber v. Nichols*, 34 Mich. 212; *Hassenyer v. Railroad Co.*, 48 Id. 205; *Beauchamp v.*

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Mining Co., 50 Id. 163; *Peer v. Ryan*, 54 Id. 224; *Palmer v. Harrison*, 57 Id. 182; *Nelson v. Mining Co.*, 65 Id. 288; *Bueck v. Lindsay*, Id. 105; *Marshall v. Furniture Co.*, 67 Id. 167; *Luke v. Mining Co.*, 71 Id. 364; *Breckenfelder v. Railway Co.*, 79 Id. 562; *Underhill v. Railway Co.*, 81 Id. 45; and as bearing upon what questions should be left to the jury, counsel cited *Boick v. Bissell*, 80 Mich. 260; *Little v. Railway Co.*, 78 Id. 205; *Eddy v. Mining Co.*, 81 Id. 555.

Sidney T. Miller and *Brennan & Donnelly*, for defendant Detroit City Railway Company.

John J. Speed, for defendant city.

LONG, J. This is an action on the case brought to recover damages for being thrown from a wagon and severely injured through the joint negligence of both defendants.

The plaintiff is a pretzel manufacturer, and vends and delivers his pretzels to different saloon-keepers in the city of Detroit. On July 29, 1890, he was engaged in delivering pretzels with a horse and light spring wagon, in which was a box in which he carried the pretzels he sold. The pretzel-box was high, and sat within the wagon-box, but was not fastened thereto. The seat occupied by the driver was on top of the front end of the pretzel-box, with the feet resting upon a guard.

Baker street is a public street in the city of Detroit, running in an easterly and westerly course, and had been paved with cedar blocks. The Detroit City Railway Company's track occupies the center of the street, and at the time before stated the company was engaged in replacing the cedar-block pavement between the rails of its track with cobble-stones. In doing so it had obstructed the south side of the street in the block east of Seventeenth street with blocks removed from the center of the street and with the cobble-stones, so that travelers could not pass with vehicles on that side of the street. The evidence

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tended to show that the railway company had deposited a ridge of sand or *débris*, taken from between the rails, along or close beside the north rail, causing a ridge about six inches in height and some 50 feet in length, extending from Seventeenth street east to where the employés of the company were repairing the track.

Plaintiff had invited a Mr. Poole to ride with him that morning, and he was seated at the right hand of Zanger upon the box. The plaintiff drove from Eighteenth street east on the south side of Baker street, and as he passed Seventeenth street he observed the men at work repairing the street railway, and the obstructions upon the south side, and when about 10 feet therefrom, drove angling across the track to the north side, at a speed of from four to six miles an hour. He saw the ridge, which was about six inches high, and the forward wheels passed over it without difficulty; but just as the right hind wheel was upon the ridge the left forward wheel went into a hole in the cedar-block pavement, which he had not seen, when the wagon tipped, the pretzel-box was capsized, and the plaintiff and Poole were thrown to the ground, plaintiff falling upon some iron rails lying in the street next to the gutter, and his leg was broken. The testimony tended to show that the hole was about one foot long, about as wide, and from five to seven inches deep, and was caused by the cedar blocks having been worn out or removed. Plaintiff's testimony tended further to show that he drove by there on the Sunday previous, and no work was then going on, and there were no obstructions there; and that on the morning of the 29th, the date of the injury, before he reached the obstruction, he saw that they were repairing the streets, and the blocks torn up.

Defendants introduced no testimony. When the plaintiff closed his proofs, counsel for defendants requested the

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court to direct a verdict for the defendants. The court so directed the verdict, and plaintiff brings error.

It is claimed on behalf of the street railway-company that there is no proof of negligence upon its part; that it was repairing its track at or near the place of the accident, and it had a right to deposit material taken from between the rails at the side of its track; and that it would not be liable if it removed the deposit within a reasonable time.

We think counsel are correct in this contention. It was held in *Bowen v. Railway Co.*, 54 Mich. 502, that, in an action to recover for an injury caused by an obstruction to the highway, it is proper for the plaintiff to base his right of action upon the obstruction as unlawful at the time of the injury, and it rests upon the defense to show that the obstruction was lawful under the circumstances; that it is always a sufficient answer to say that the obstruction was in the highway for only a reasonable time, and for a lawful purpose. It appears in the present case that the obstruction placed in the highway by the defendant railway company had only remained there for a few hours,[1] and not for an unreasonable length of time.

This doctrine was also laid down in *Cowan v. Railway Co.*, 84 Mich. 583, where it was said:

"In the ordinary course of operating its street railway the defendant was engaged in repairing and laying its track, which it had the undoubted right to do; and it was not negligence for it to excavate and throw up earth while thus engaged. The proofs do not show that the earth was allowed to remain there for an unreasonable time, nor does the declaration allege that it was allowed to remain there in the night-time, or without lights or barriers."

[1] It was placed there in the morning of the day of the accident, which occurred at about 11 o'clock in the forenoon.

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The proofs in the present case have no tendency to show any negligence on the part of the street-railway company.

So far as the defendant city is concerned, there is no proof tending to make a case in favor of the plaintiff against it. The proximate cause of the injury was this ridge of sand across which the plaintiff drove. It is not shown by the record, nor claimed, that the injury would have occurred solely by reason of the defect in the street occasioned by the hole, but the plaintiff's whole case is grounded upon the theory that, by running upon this ridge of sand with one wheel, and the other dropping into the hole, the injury was occasioned. We think no case was made against the city.

Aside from these considerations, I think the court was correct in taking the case from the jury upon the ground of the plaintiff's contributory negligence. He saw the men at work there, knew the track was being repaired, saw the pile of sand, and drove over it with the horse upon a trot, and without any consideration that the high, loose box upon which he was riding might be turned out of the wagon by running over this obstruction, which was plainly within his view.

The judgment must be affirmed, with costs.

MORSE and GRANT, JJ., concurred with LONG, J.

CHAMPLIN, C. J. *(dissenting).* This is an action on the case brought to recover damages for being thrown from a wagon and severely injured through the joint negligence of both defendants.

The plaintiff is a pretzel manufacturer, and vends and delivers his pretzels to different saloon-keepers in the city of Detroit. On July 29, 1890, he was engaged in delivering pretzels with a horse and light spring wagon, in which was a box in which he carried the pretzels he

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sold. The pretzel-box was high, and sat within the wagon-box, but was not fastened thereto. The seat occupied by the driver was on top of the front end of the pretzel-box, with the feet resting upon a guard.

Baker street is a public street in the city of Detroit, running in an easterly and westerly course, and had been paved with cedar blocks. The Detroit City Railway Company's track occupies the center of the street, and at the time above stated it was engaged in replacing the cedar-block pavement between the rails of its track with cobble-stones. In doing so it had obstructed the south side of the street in the block east of Seventeenth street with blocks removed from the center of the street and with the cobble-stones, so that travelers could not pass with vehicles on that side of the street. The evidence tended to show that the railway company had deposited a ridge of sand or *débris*, taken from between the rails, along or close beside the north rail, causing a ridge about six inches in height and 50 feet in length, extending from Seventeenth street east to where the employés of the company were repairing the track.

Plaintiff had invited a Mr. Poole to ride with him upon the morning of the 29th of July, and he was seated at the right hand of Zanger upon the box. The plaintiff drove from Eighteenth street east on the south side of Baker street, and as he passed Seventeenth street he observed the men at work repairing the street railway, and the obstructions upon the south side, and, when about 10 feet therefrom, drove angling across the track to the north side, at a speed of from four to six miles an hour. He saw the ridge, which was about six inches high, and the forward wheels passed over it without difficulty; but just as the right hind wheel was upon the ridge the left forward wheel went into a hole in the cedar-block pavement, which he had not seen, when the

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wagon tipped, the pretzel-box was capsized, and plaintiff and Poole were thrown to the ground, plaintiff falling upon some iron rails lying in the street next to the gutter, and plaintiff's leg was broken. The testimony tended to show that the hole was about one foot long, about as wide, and from five to seven inches in depth, and was caused by the cedar blocks having been worn out or removed. There was testimony tending to show that this defect in the pavement had existed at least four or five weeks. There was also testimony tending to show that the plaintiff was exercising ordinary care, and that the accident was caused by the ridge of sand and the hole in the pavement, over and into which the plaintiff drove at a speed of from four to six miles an hour.

The defendants introduced no testimony. When the plaintiff closed his proofs, Mr. Donnelly, counsel for the railway company, stated to the court:

"I desire to make a motion that, under the pleadings and proofs, there can be no recovery against the Detroit City Railway, because of the conduct of the plaintiff himself, and there is no proof of negligence on the part of the railway company."

Mr. Speed, of counsel for the city, then said to the court:

"The liability of the city, if there is any, is solely under the statute. The city would not be liable at all until a reasonable time had elapsed in which to remove the ridge of sand."

Thereupon the court said:

"I don't think the plaintiff has made out a case. It appears from the evidence that he was riding in a light spring wagon, with a loose box in it, not fastened to the conveyance, or to the wagon upon which he was sitting; that these two men sat upon it. They were riding in plain view of these obstructions, and were thrown out. I don't think he used the care that he should have used,

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and I think that the accident might have been avoided if he had taken the pains that every man ought to take in driving over the streets. Under the evidence in this case, your verdict will be for the defendants."

To this instruction counsel for the plaintiff then and there excepted.

The question is whether the court erred in taking the case from the jury. It is claimed on behalf of the railway company that there is no proof of negligence upon its part; that it was repairing its track at or near the place of the accident, and it had a right to deposit the material taken from the space between its rails at the side of the track; and that it would not be liable if it removed the deposit within a reasonable time.

In *Bowen v. Railway Co.*, 54 Mich. 502, we held that, in an action to recover for an injury caused by an obstruction to the highway, it is proper for the plaintiff to base his right of action upon the obstruction as unlawful at the time of the injury, and it rests upon the defense to show that the obstruction was lawful under the circumstances; that it is always a sufficient answer to say that the obstruction was in the highway only a reasonable time, and for a lawful purpose.

The plaintiff made a *prima facie* case of negligence when he showed the obstruction, and gave evidence tending to show that the railway company placed it there. It is true, as claimed by counsel for the company, that, where the facts are conceded or undisputed, the question of reasonable time is for the court; but the court must be informed of the time before it can determine that it is reasonable, and the railway company should have informed the court of the time the ridge of sand had existed, and the circumstances bearing upon the duty of the company to do what should have been done, to show

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that the obstruction was lawful, and that it was not in default in not removing it sooner.

The suggestions of the attorney for the city, as reasons why the case should be taken from the jury, misconceive the claim made by the plaintiff upon which the city is to be held liable. He does not seek to hold the city liable for the defect in the street caused by the ridge of sand, but for permitting the street itself to be and remain out of repair after it had notice of the defect. The defect complained of, and which contributed to the injury, as claimed, was the hole in the pavement; and there was testimony tending to show that the defect had existed for so long a time that, if the jury believed the testimony, they would have been authorized to find as a fact that the city had notice of such defect, and had neglected for a reasonable time after such notice to repair the street.

But the court took the case from the jury upon the ground that the plaintiff himself neglected to take such care as the circumstances demanded, and by reason thereof contributed to his own injury. The speed at which the plaintiff was driving was not *per se* negligence on his part. It requires the combined circumstances, — the obstruction in the street, the defect in the pavement, the speed at which he was driving, and the care and caution exercised,—these must all be considered in reaching a conclusion as to whether he was exercising that care which a prudent man would have exercised under all the circumstances. He did see the ridge, which to all appearances was a ridge of sand six inches in height. Would it have been prudent for a person to drive on a slow trot over such an apparent obstruction? Would persons of ordinary intelligence, judging of such conduct by the ordinary actions of careful and prudent persons, come

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to but one conclusion, and that one that the plaintiff was heedless of his own welfare, and of the risk of accident and injury, in doing as he did under the circumstances? Ought he, in exercising due care, to have discovered the hole in the pavement in time to avoid it? and ought he to have avoided it, under the circumstances, whether the defect was known or unknown? Was the ridge such an obstruction as called upon the plaintiff, in the exercise of due care on his part, to bring his horse to a walk, or, if need be, to stop him, before attempting to cross?

I am not prepared to say that every unbiased mind, acquainted with the motives which usually actuate men of ordinary intelligence to act prudently for their own safety, would reach the same conclusion upon the circumstances above stated, and would, with one accord, pronounce the plaintiff as failing to exercise that care which prudent men of ordinary intelligence would exercise under like circumstances. Consequently the case is one that should have been submitted to the jury.

McGRATH, J., did not sit.

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ABATEMENT.

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ADMISSIONS—See EVIDENCE (7, 23, 36).

ADVERSE POSSESSION.

1. Adverse possession of land, up to a marked boundary, for 30 years, establishes the right of the occupant to the premises so occupied, although his original entry may not have been under any title or claim of title. *Sanscrainte v. Torongo,* 69.
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APPEAL—See HIGHWAYS (1).

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ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A creditor received from a debtor certain real-estate mortgages and a bill of sale of personal property in payment, as he claimed, of an existing indebtedness. About two months afterwards the debtor made a general assignment of all his property to a third party for the benefit of his creditors, and the assignee sold the equity of redemption in the mortgaged premises at public auction, and the creditor (mortgagee) became the purchaser of a portion of the land covered by his mortgages. In a suit brought by the creditor against a *judgment* creditor of the debtor, who had sold the property covered by the bill of sale on execution, the defendant was permitted to prove said assignment and sale by the assignee, which testimony is held admissible; there also being testimony in the case tending to show that the debtor contemplated making the assignment before the transactions with the plaintiff. *Wessels v. Beeman*, 481.
2. An assignment by one partner of *his* property for the benefit of his creditors, which does not purport to convey the partnership property, gives the assignee no title to said property or right to its possession. *Van Kleeck v. McCabe*, 599.

ATTACHMENT—See CHATTEL MORTGAGE (2-6); LOG-LIEN LAW (1).

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BAIL—See CRIMINAL LAW.

BAILMENT.

A stock-broker who receives a certificate of stock from the owner for safe-keeping, which he fails to deliver on demand, having delivered it to the officers of the corporation without the consent of the owner, who have cancelled it, is guilty of its conversion, regardless of his intention in the premises. *Hubbell v. Blandy*, 209.

BANKS AND BANKING—See PARTNERSHIP (7, 8).

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BILLS AND NOTES.

1. It is competent for the first indorser to secure the second indorser, but the maker has no right to be subrogated to the place of a second indorser. *Nash v. Burchard*, 85.
2. A joint maker of a promissory note cannot limit his liability to that of an indorser by parol testimony that he signed as a surety, and that, by an agreement with the agent of the payee who took the note, he was to be released unless notified of its non-payment. *Aultman & Taylor Co. v. Gorham*, 233.
3. Where a mortgagor, in order to secure the release of the property and further time, gives the mortgagee his promissory note for the debt, which is signed by a third party at his request before its delivery, there is a sufficient consideration to hold both the maker and the surety. *Id.*

BOARD OF SUPERVISORS—See SHERIFF'S FEES.

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CHARGE TO JURY.

1. In a suit upon a building contract the plaintiffs claimed that they were to furnish and pay the men, who were to work by the day, and they added 25 to 50 cents per day for each man's work above the *per diem* actually paid them. The defendant contested plaintiffs' extra charge, and also claimed to recover pay for carrying the men to and from their work. And it is held that the jury was properly instructed that, if they deducted plaintiffs' extra charge from their bill, they should also reject that of the defendant. *McDonnell v. Ford*, 198.
2. Where the uncontradicted testimony shows the payment by the plaintiffs of a certain sum of money for the benefit of the defendant at his request, it is not error for the court to state such fact to the jury. *Id.*
3. It is error to instruct the jury that the undisputed testimony shows a certain state of facts when there is contra-

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CHARGE TO JURY—Continued.

dictory testimony on the subject. *Schroeder v. Farmers' Fire Insurance Co.*, 310.

4. It is error for the court to refer in his charge to the jury to the absence of the plaintiff, who is an assignee of the claim sued upon, at the trial, he having no knowledge of the facts in issue, and it being immaterial whether he was present or not, as long as attorneys were present who were fully authorized to represent him in the conduct of the trial. *Hitchcock v. Davis*, 680.

See DAMAGES (1).

CHATTEL MORTGAGE.

1. Where, on the purchase of a stock of goods, it was agreed between the vendor and vendee and the vendee's father that, if he would advance $500 to his daughter to apply on the purchase price, he should be repaid out of the first sales made by the vendee, who afterwards secured such loan by a chattel mortgage of the goods, the vendor is estopped from claiming any lien for the unpaid purchase money as against an assignee of the mortgage. *Finn v. Donahoe*, 292.

2. Chattel-mortgaged goods were replevied from attaching creditors by the mortgagees before the completion of an inventory, and on the trial the defendants claimed the right to recover on the ground that the attachment was made subject to the mortgages, which were admitted to be valid, and that defendants had the right to the joint possession of the goods until the inventory was completed, and also on the ground that the mortgages were being fraudulently used to defeat the claims of other creditors. And it is held that the defenses were antagonistic, and that evidence of such fraudulent use of the mortgages was properly excluded. *Rosenfield v. Case*, 295.

3. The contention that a sheriff who attaches chattel-mortgaged property cannot be disturbed in his possession by the mortgagee until an inventory is completed, after which he has the right to fix the character of his levy, and whether in opposition or subject to the mortgage, has been settled in the negative in *Merrill v. Denton*, 78 Mich. 634, 635. *Id.* 296.

4. An instruction that, if a sheriff levied an attachment upon a stock of goods subject to a chattel mortgage, he cannot

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CHATTEL MORTGAGE—Continued.

recover in a replevin suit brought by the mortgagee unless the value of the goods exceeds the amount of the mortgage, is sustained. *Id.*

5. Where a mortgagee is entitled to the possession of the mortgaged property, as against attaching creditors, at the time he replevies it, the after payment of his mortgage by a second mortgagee will not affect his right to a judgment against the defendants. *Id.*

6. The attachment of chattel-mortgaged property in opposition to the mortgage, and the refusal of the officer to admit the mortgagees to a joint possession, justifies them in demanding possession under the insecurity clause in their mortgage, whether the debt secured thereby is due or not due. *Id.*

7. In a suit between a plaintiff claiming personal property under a bill of sale absolute on its face, and a creditor of the vendor, the jury may consider the fact that the vendee filed the bill of sale in the office of the township clerk of the proper township as evidence bearing upon the claim made by him that the transfer was absolute, and not by way of security. *Wessels v. Beeman*, 482.

8. Two chattel mortgages were delivered to an agent for foreclosure, to whom the mortgagor surrendered the property, and then repossessed himself of it. The agent replevied it in his own name, and completed the foreclosure by a sale of the property to the mortgagee, after which the mortgagor recovered a judgment for its return, which was complied with. The mortgagor then sold the property to a third person, who was sued by the mortgagee in trover *after* the agent had recovered a *final* judgment in the replevin suit determining the validity of the chattel mortgages, and the vendee sought to retry said question, which he is held estopped from doing by said judgment. *Hoppin v. Avery*, 551.

CONDITION—See WILL (1).

CONSIDERATION.

Where a mortgagor, in order to secure the release of the property and further time, gives the mortgagee his promissory note for the debt, which is signed by a third party at his request before its delivery, there is a sufficient consideration

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CONSIDERATION—Continued.

to hold both the maker and the surety. *Aultman & Taylor Co. v. Gorham*, 233.

See DURESS.

CONSTITUTIONAL LAW.

1. Section 7 of Act No. 129, Laws of 1883, entitled "An act for the organization of telephone and messenger service companies," making stockholders individually liable for labor and material debts, is fairly embraced within the title of the act. *Ripley v. Evans*, 218.
2. Act No. 141, Laws of 1877, providing for the enforcement of the individual liability of stockholders, is not unconstitutional by reason of the exemption from its operation of cases where the suit is for labor, and the action is brought by the person who performed the labor. *Id.*
3. The provisions of chapter 130 of the Compiled Laws of 1871, under which the individual liability of stockholders was enforced by bill in chancery, was amended by implication by Act No. 141, Laws of 1877, which repealed all inconsistent acts, or acts giving any other or different remedy, or form of remedy, and the later act is not in conflict with section 25, art. 4, of the Constitution, which requires the re-enactment and publication at length of altered or amended sections. *Id.*
4. Act No. 219, Laws of 1875 (How. Stat. §§ 4778–4787), which provides for the condemnation of land by corporations organized under Act No. 12, Laws of 1869 (How. Stat. §§ 4763–4777), to establish and maintain rural cemeteries, and by the board of health of any township, or the common council, board of health, or board of trustees of any city or village, is unconstitutional. *Board of Health of Portage Tp. v. Van Hoesen*, 533.

CONTEMPT PROCEEDINGS.

In contempt proceedings under How. Stat. chap. 256, to enforce civil remedies, a finding by the court that the complainant has sustained an actual loss or injury by the misconduct complained of, and an order for the payment of some sum as compensation therefor, are conditions precedent to an

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CONTEMPT PROCEEDINGS—Continued.

order that the respondent pay the costs and expenses of the proceedings. *Holland v. Weed*, 584.

CONTRACT.

1. Where a written memorandum or agreement does not contain the entire contract between the parties, prior and contemporaneous agreements and conversations may be shown in order to prove what the whole contract was. *Stahelin v. Sowle*, 124.
2. Where a contract not required by the statute of frauds to be in writing to be binding rests partly in writing and partly in parol, the whole is regarded as a parol agreement, and may be proved by oral testimony, and the jury are to determine its terms from the whole testimony. In such a case the writing is competent evidence to prove the terms of the contract, so far as they are expressed therein, and may be regarded as admissions of the facts, and, indeed, the best evidence of the facts, so stated therein. *Id.*
3. In a suit to recover damages for being prevented from performing a contract, it is incumbent upon the plaintiff to make out the contract alleged in his declaration, and the burden is upon him to show performance, or, in default, that the defendant wrongfully prevented such performance. *Id.*
4. Where one party has departed from a special contract for the delivery of specific articles from each to the other, the other party may treat it as rescinded; and if, by the terms of the contract, concurrent acts are to be performed, as the delivery of property by one party and the payment of the price by the other, if either party refuses performance the other may treat the contract as abandoned, and justify rescission under it. *Id.*
5. A subscription paper by which the subscribers "promise to pay the trustees of the hotel to be built at St. Joseph [their place of residence] the sums set opposite our names, to be taken as stock, $25 per share," is insufficient in and of itself to form a contract. *Plank's Tavern Co. v. Burkhard*, 182.
6. Two of said subscribers, upon being presented with a more formal paper, refused to sign it, and repudiated their existing subscription, after which a corporation was organized and the hotel erected with full knowledge of the refusal by

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CONTRACT—Continued.

said subscribers to pay their subscription, which the corporation sought to recover by suit. On the trial it was shown by parol testimony that the hotel was not such an one as was contemplated by the signers of the original subscription paper, and that it failed to meet in many particulars the representations made to the defendants to obtain their subscription. And it is held that the court properly directed a verdict in defendants' favor. *Id.*

7. Evidence of a custom among contractors and builders to charge, for each man working on a job taken by the day, an advance over the price paid him by the contractor, is held admissible in this case, it appearing that the men were general employés of the contractors, and that their labor was worth the price charged therefor. *McDonnell v. Ford*, 198.

8. In a suit by a firm composed of two members to recover a balance due on a building contract, it appeared that the defendant contracted entirely with one partner, but that all of the bills were rendered to him in the firm name. And it is held that a request for an instruction that, before the plaintiffs could recover, the jury must be satisfied that the defendant contracted with the *firm*, was properly refused. *Id.*

9. In a suit upon a building contract the plaintiffs claimed that they were to furnish and pay the men, who were to work by the day, and they added 25 to 50 cents per day for each man's work above the *per diem* actually paid them. The defendant contested plaintiffs' extra charge, and also claimed to recover pay for carrying the men to and from their work. And it is held that the jury was properly instructed that, if they deducted plaintiffs' extra charge from their bill, they should also reject that of the defendant. *Id.*

10. Where logs which were not delivered at the time fixed by the contract, because "hung up" by reason of low water, were received the following year without any demur or protest on account of such delay, but payment was refused because the scale was disputed, such non-delivery is not a substantial breach of the contract. *Malone v. Gates*, 332.

CONTRIBUTORY NEGLIGENCE—See NEGLIGENCE (1–3, 6, 8, 13, 15, 18, 19, 21).

CONVERSION—See BAILMENT; DAMAGES (1).

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CORPORATIONS.

1. It is not necessary to issue and have returned unsatisfied an execution to any other county than that in which the principal office of a corporation is situated, or its business carried on, before proceeding to enforce the individual liability of the stockholders under How. Stat. §§ 4886–4899, although it may appear that the corporation had property or effects in another county. *Ripley v. Evans*, 217.
2. Act No. 129, Laws of 1883 (3 How. Stat. §§ 3718*a*–3718*h*), section 7 of which provides for the enforcement of the individual liability of stockholders for labor and materials furnished for corporations organized under said act during the time they were stockholders, "at any time after an execution shall be returned not satisfied against such company," must be construed with Act No. 141, Laws of 1877, providing for the enforcement of the individual liability of stockholders, and the execution referred to in the latter act is to issue to the county where the principal office of the corporation is situated, as provided in the 1877 act. *Id.*
3. In a proceeding under How. Stat. §§ 4886–4899, to enforce the individual liability of stockholders, the return of the sheriff of an execution against the corporation, issued to the proper county, unsatisfied, is conclusive between the parties. *Id.* 218.
4. Section 7 of Act No. 129, Laws of 1883, entitled "An act for the organization of telephone and messenger service companies," making stockholders individually liable for labor and material debts, is fairly embraced within the title of the act. *Id.*
5. Act No. 141, Laws of 1877, providing for the enforcement of the individual liability of stockholders, is not unconstitutional by reason of the exemption from its operation of cases where the suit is for labor, and the action is brought by the person who performed the labor. *Id.*
6. The provisions of chapter 130 of the Compiled Laws of 1871, under which the individual liability of stockholders was enforced by bill in chancery, was amended by implication by Act No. 141, Laws of 1877, which repealed all inconsistent acts, or acts giving any other or different remedy, or form of remedy, and the later act is not in conflict with section 25, art 4, of the Constitution, which requires the re-enact-

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CORPORATIONS—Continued.

ment and publication at length of altered or amended sections. *Id.*

7. Act No. 219, Laws of 1875 (How. Stat. §§ 4773–4787), which provides for the condemnation of land by corporations organized under Act No. 12, Laws of 1869 (How. Stat. §§ 4763–4777), to establish and maintain rural cemeteries, and by the board of health of any township, or the common council, board of health, or board of trustees of any city or village, is unconstitutional. *Board of Health of Portage Tp. v. Van Hoesen*, 533.

See MUNICIPAL CORPORATIONS.

COSTS.

1. One having a personal interest in the result of a suit which he institutes in the name of infant complainants, who are also interested, he acting as their next friend, will be charged with the costs in case the bill is dismissed. *Crittenden v. Canfield*, 152.

2. In the absence of any express agreement, a logging contractor is not liable for costs incurred by the log-owners in defending against an illegal claim of a lien under the log-lien act. *Meyer v. Montgomery*, 278.

COUNTY CLERK.

The office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, his choice is not confined to any race, *sex*, color, or age. *Wilson v. Genesee Circuit Judge*, 493.

CRIMINAL LAW.

After a respondent was convicted of murder, which conviction was reversed, he was admitted to bail. Pending his second trial he was ordered into custody, and a *mandamus* to compel the circuit judge to admit him to bail is denied. *Hull v. Wayne Circuit Judge*, 497.

CUSTOM—See CONTRACT (7).

DAMAGES.

1. The court instructed the jury that the measure of plaintiff's

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DAMAGES—Continued.

damages for stock alleged to have been converted would be the value of the stock when the owner received notice of its conversion, with interest, and all dividends paid on the stock from the time of its delivery to the broker up to the date of said notice, with interest from the dates when they were payable, which instruction was excepted to by the defendant, who contended that plaintiff could only recover the highest price reached by the stock within a reasonable time after plaintiff learned of its conversion, and within which he could go into the market and repurchase it. And it is held that, as the application of the latter rule would not decrease the judgment under the established facts, no error is seen in the case, and the judgment is affirmed. *Hubbell v. Blandy*, 209.

2. In a libel suit it appeared that the article complained of was libelous *per se*, and the malice of the defendant plainly appeared from the face of the publication. And it is held that the failure of the court to instruct the jury to consider, as affecting the question of exemplary damages, the claim of the defendant, supported by his testimony, that he was informed prior to publishing the article that the charges therein made were true, as showing his good faith, was non-prejudicial error; it appearing that the jury were instructed to consider the mitigating circumstances in the case which were only shown by said testimony. *Orth v. Featherly*, 315.

3. The law does not presume that a jury in a negligence case, which found a verdict for the plaintiff notwithstanding erroneous instructions by the court upon the law of negligence, were prejudiced thereby in their assessment of damages. *Kalembach v. Mich. Central R. R. Co.*, 509.

4. A declaration in a negligence case in which the only allegation of special damages were "that plaintiff had been put to great expense in procuring medicine, medical attendance, and care, in which he had expended the sum of $500 for physicians' services, nurses, and help," and that he was "greatly and permanently injured, suffered great physical and mental pain, and became sore, sick, lame, and languishing," is not sufficiently specific to admit testimony of any permanent injury. *Id.*

See DEED (2); LIBEL AND SLANDER (5); NEGLIGENCE (7).

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DEED.

1. Where a husband, who was equitably entitled to a reconveyance of 20 acres of land which he had conveyed to his brother by a deed absolute in form, but intended as a mortgage, in anticipation of approaching death directed that the land be reconveyed to his wife, which was done, the deed is held to have vested the title to the land in the wife as effectually as if taken in the name of the husband, and he had deeded directly to the wife, in consideration of love and affection, and in anticipation of approaching death. *Crittenden v. Canfield*, 152.
2. A grantor was induced to execute a warranty deed of an entire lot of land, a portion of which she had previously conveyed to a third party, of which fact the grantee was fully advised, by the statement of the scrivener, made in the presence of the grantee, that including the entire lot in the deed would make no difference, as the matter was fully understood by both parties, and that the covenants of warranty would only apply to the portion of the lot owned by the grantor. The grantee attempted to take possession of the entire lot, but, finding that the prior deed was on record at the time of the execution of the second deed, sued the grantor upon the covenants of warranty, in which suit the whole matter was litigated, and submitted to the jury, who were instructed that they must find a verdict for the plaintiff in any event, and, if satisfied that the defendant's contention as to the circumstances under which the deed was executed was sustained by the testimony, they must assess the plaintiff's damages at the sum of one dollar (being the sum tendered by the defendant, and paid into court, as payment in full for all damages sustained by the plaintiff by reason of the alleged breach of covenant), but, if they found against the defendant in that behalf, they should assess plaintiff's damages in proportion as the value of the part of the lot primarily sold bore to the value of the entire lot, being the purchase price agreed to be paid by the plaintiff. The jury found a verdict for $95 in favor of the plaintiff, upon which judgment was entered, with costs, from which the defendant did not appeal, but filed a bill setting up the same state of facts attempted to be proved in the suit at law, and praying for the reformation of the deed, and that

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DEED—Continued.

the collection of the judgment be enjoined. The defendant interposed a plea setting up the proceedings and judgment in the suit at law, which were claimed to be *res judicata* of the issues tendered by the bill of complaint; which plea was held sufficient to bar the relief prayed for, and, the complainant declining to take issue upon the plea, the bill was dismissed. And in reversing said decree the Court hold:

a—That the claim set up in the plea that complainant's case had been tried before a court of law, and found adversely to the complainant, does not meet the case made by the bill.

b—That, if complainant's contention is correct as stated in the bill, the plaintiff was not entitled to any judgment whatever in the action at law, and the complainant should not have been subjected to the costs following such judgment; that, if the deed had expressed what complainant claims was the true intent and agreement of the parties, plaintiff would not have obtained a judgment even for nominal damages; and therefore complainant is entitled to maintain her bill, and, if her claim is substantiated on the hearing, she will be entitled to the relief prayed for. *Bush v. Merriman*, 260.

3. Recording a deed raises a presumption of delivery to the grantee, which may be rebutted by proof of a contrary intent on the part of the party responsible for such recording. *Glaze v. Three Rivers, etc., Ins. Co.*, 849.

See EQUITY JURISDICTION.

DEFINITIONS.

1. Occupied. 135 (2).
2. Unoccupied premises. 136 (3).
3. Gross mistake as used with reference to a log scale. 332 (3).
4. Swamp-land scrip. 353 (1).

DELIVERY—See DEED (3).

DEMAND—See EVIDENCE (17).

DEMURRER—See EQUITY PLEADING.

DIRECTING VERDICT.

The court is held to have erred in finding as matter of law,

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DIRECTING VERDICT—Continued.

upon plaintiff's testimony, that the defendants had surrendered possession of a mill leased of the plaintiff prior to its destruction by fire, and that its care had been assumed by the plaintiff; plaintiff not having rested his case, and not claiming to be entitled to recover upon the case then presented, and having advanced no theory inconsistent with the case set forth in his declaration. *Stevens v. Pantlind*, 476.

DISPUTED BOUNDARY—See EVIDENCE (4).

DURESS.

Where a man 72 years of age is threatened with arrest and imprisonment for an act which he denies committing, but on account of his age and ignorance of the law is so put in fear as to overcome his will, and cause him to pay the money demanded because of a fear that he will be unjustly imprisoned on the complaint of the person making the threat, and the testimony of witnesses produced by him, such payment is made under duress, and the money may be recovered as paid without consideration. *Cribbs v. Sowle*, 340.

EJECTMENT—See ADVERSE POSSESSION; EVIDENCE (4).

EQUITABLE LIEN.

Complainants are 16 of 147 signers of a subscription paper, by which the subscribers agreed to pay specified sums for the purpose of inducing defendant to erect a flouring-mill. The mill was erected, and, after operating it for over two years at a loss, the defendant sold the machinery, and was preparing to remove it, when complainants filed a bill to enjoin such removal, and for a decree declaring their subscriptions a lien upon the property. There was no express stipulation, verbal or written, that defendant should continue the business for any specified time. And it is held that the evidence establishes the fact that defendant fully complied with his agreement, and made an honest and faithful attempt to render the business a success, and that, having done this, he was no longer compelled to carry on the business, and had the right to sell and remove the machinery; and that, there being no express provision for a lien, none can be implied in favor of the complainants. *Ayres v. Dutton*, 528.

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EQUITY JURISDICTION.

1. In this State the distinction between law and equity, as applied to remedies, has been maintained. The courts of law have no jurisdiction to reform written instruments, it being vested exclusively in the equity courts. *Bush v. Merriman*, 231.

2. It has long been settled that if, by reason of fraud, mistake, accident, or surprise, an instrument does not express the true intent and meaning of the parties, equity will upon satisfactory evidence reform it. *Id.*

EQUITY PLEADING.

A demurrer to a supplemental bill to reform and foreclose a mortgage, which fails to allege a want of equity in the bill, and assigns as grounds of demurrer that the complainant has not made or stated a case which entitles him to file the bill, or any bill in the nature thereof, or a case which entitles him to the relief prayed for, does not contain a sufficient statement to be treated as a general demurrer to the bill for want of equity. *Taylor v. Taylor*, 64.

ESTATES OF DECEASED PERSONS.

Where a non-resident defendant dies after the entry of judgment, and the suit is revived in the name of an executor, who is appointed on the probate of defendant's will in this State, and removes the judgment by writ of error to this Court for review, an objection that the executor has no standing in Court, it not appearing that the testator had any property in this State, is untenable, the question being ruled by *In re McCarty*, 81 Mich. 460. *Hubbell v. Blandy*, 209.

See EVIDENCE (1); MANDAMUS (1); WILL (1–3).

ESTOPPEL—See CHATTEL MORTGAGE (1, 8).

EVIDENCE.

1. An executor was sued in his *individual* character by the administrator of the estate of the widow of the testator for the conversion of certain bonds received from her after the testator's death, but before his will was probated. The executor inventoried the bonds as the property of the estate, and never claimed any personal interest in them. The administrator claimed that they were delivered to the executor for safe-keeping by the widow, who had received them

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EVIDENCE—Continued.

as a gift from her husband during his life-time, which the executor denied, and claimed that the bonds were delivered to him with the understanding that he received them as the property of the estate, and with the free will and consent of the widow. And it is held (by the majority of the Court) that the real issue was between the two estates as to the ownership of the bonds, and that the executor was not disqualified from testifying as a witness under How. Stat. § 7545, which prohibits the *opposite party*, in a suit prosecuted or defended by the heirs or personal representatives of a deceased person, from testifying to facts equally within the knowledge of the decedent, but that an *heir of the widow* was so disqualified. *Penny v. Croul*, 15.

2. Chief Justice CHAMPLIN filed a dissenting opinion, concurred in by MCGRATH, J., holding that, while the statute in question has been construed as embracing within its spirit the real as well as nominal parties to a suit, no well-considered case has made an exception of the *parties to the record*. *Id.*

3. Where land is described as lying in a given direction from a certain creek, and in later deeds as lying in a like direction from a specified river, the identity of the two streams may be shown for the purpose of showing the identity of the land so described. *Sanscrainte v. Torongo*, 69.

4. In an ejectment suit involving a disputed boundary, evidence of the statement by the defendant's husband, in her presence and without dissent on her part, that, if he had notified plaintiff to make her half of the division fence, she would not have allowed him to move it from the old line, and for this reason he did not give such notice, but made the change at his own expense, is admissible, and warrants the inference that the fence was moved at the instance of the defendant, who claimed title on the trial to the lands inclosed with her own by such removal. *Id.*

5. Evidence of general reputation that the land occupied by a plaintiff in ejectment, who seeks so establish title by adverse possession, was claimed to be owned by him, is admissible. *Id.*

6. Where a written memorandum or agreement does not contain the entire contract between the parties, prior and contemporaneous agreements and conversations may be shown in

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EVIDENCE—Continued.

order to prove what the whole contract was. *Stahelin v. Sowle*, 124.

7. Where a contract not required by the statute of frauds to be in writing to be binding rests partly in writing and partly in parol, the whole is regarded as a parol agreement, and may be proved by oral testimony, and the jury are to determine its terms from the whole testimony. In such a case the writing is competent evidence to prove the terms of the contract, so far as they are expressed therein, and may be regarded as admissions of the facts, and, indeed, the best evidence of the facts, so stated therein. *Id.*

8. In a suit to recover damages for being prevented from performing a contract, it is incumbent upon the plaintiff to make out the contract alleged in his declaration, and the burden is upon him to show performance, or, in default, that the defendant wrongfully prevented such performance. *Id.*

9. In a suit by a wife against a saloon-keeper and his bondsmen to recover damages sustained by reason of the killing of her husband by an intoxicated person, alleged to have procured his liquor of the defendant saloon-keeper, evidence showing that the slayer of the husband was a person in the habit of becoming intoxicated is admissible for the purpose of showing that the sale of the liquor was unlawful. *Doty v. Postal*, 143.

10. Evidence of a custom among contractors and builders to charge, for each man working on a job taken by the day, an advance over the price paid him by the contractor, is held admissible in this case, it appearing that the men were general employés of the contractors, and that their labor was worth the price charged therefor. *McDonnell v. Ford*, 198.

11. A decree setting aside a deed on the ground of the mental incompetency of the grantor to make it is sustained upon the testimony of the leading expert witness for the grantee that, when he privately examined the grantor, he did not know whether he had made a deed, a will, or a lease, and upon the opinion of the witness that the grantor was not competent to make a sale of his land for money, and protect his interest in it. *Sponable v. Hanson*, 204.

12. A joint maker of a promissory note cannot limit his liabil-

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EVIDENCE—Continued.

ity to that of an indorser by parol testimony that he signed as a surety, and that, by an agreement with the agent of the payee who took the note, he was to be released unless notified of its non-payment. *Aultman & Taylor Co. v. Gorham*, 233.

13. The rules of evidence at law and in equity are the same, but when the question is not *what* the terms of the written contract are, but whether the contract as written was entered into or whether it was obtained by fraud, or is founded in surprise, accident, or mistake, these subjects of inquiry are open to parol testimony, irrespective of what the writing contains. *Bush v. Merriman*, 261.

14. Evidence of a parol agreement made after the execution of a written contract for the purchase of the cut of a shingle-mill, and for the passing of title when the shingles were reported and paid for, by which the vendor was to ship shingles not so reported and paid for, the title to which was to pass on their shipment, is admissible. *Summers v. Wagner*, 272.

15. In a suit by a sectionman to recover for injuries sustained while assisting in loading steel rails onto moving flat-cars by the direction of a superior servant, he may show how many of the sectionmen employed with him had had no experience in that particular kind of work, its severity, whether any of the men gave out before the accident to plaintiff, whether plaintiff could see the rail before it hit him, and that loading the rails onto moving cars was more dangerous than upon stationary cars. *Palmer v. Mich. Central R. R. Co.*, 281.

16. Chattel-mortgaged goods were replevied from attaching creditors by the mortgagees before the completion of an inventory, and on the trial the defendants claimed the right to recover on the ground that the attachment was made subject to the mortgages, which were admitted to be valid, and that defendants had the right to the joint possession of the goods until the inventory was completed, and also on the ground that the mortgages were being fraudulently used to defeat the claims of other creditors. And it is held that the defenses were antagonistic, and that evidence of such

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EVIDENCE—Continued.

fraudulent use of the mortgages was properly excluded. *Rosenfield v. Case*, 295.

17. A question whether or not a demand was made at a stated time for the joint possession of chattel-mortgaged property is not objectionable as calling for the conclusion of the witness. *Id.*

18. Evidence of the disposition made of chattel-mortgaged property after its replevin by the mortgagee is immaterial to the issue, the rights of the parties being fixed by the situation at the time the writ issued. *Id.*

19. Where after the replevin of a stock of goods from a sheriff, who has seized the same under an attachment, he levies other attachments upon the goods, the appraisals made in the later suits are admissible as tending to show the value of the goods, in connection with evidence tending to show that there had been no material change in the goods since they were replevied. *Id.*

20. Evidence of the estimate of value placed upon a stock of chattel-mortgaged goods by the owner and mortgagor is inadmissible in a suit between the mortgagees and the mortgagor's attaching creditors. *Id.* 296.

21. Upon proof of the death of a scaler mutually agreed upon by the parties to a logging contract, his scale, if free from fraud or *gross* mistake, is admissible in evidence in a suit upon the contract, and is binding upon both parties. *Malone v. Gates*, 332.

22. The scale of a deceased scaler mutually agreed upon by the parties to a logging contract is presumed to be correct, fair, and honest, but if evidence is introduced tending to show the contrary, or that there is a *gross* mistake in the scale, the burden is upon the party claiming under it to establish its correctness. *Id.*

23. Where the scale of a deceased scaler is received in evidence, it is competent for witnesses who were present when the scale was made to testify to the manner of its making, and what they did and knew about it, and what the scaler did and said while making it; and the declarations of the scaler against the correctness or honesty of his scale may also be shown. *Id.*

24. The discretion of the trial judge in the enforcement of Circuit Court Rule No. 63, which provides that "one counsel

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EVIDENCE—Continued.

only on each side shall examine and cross-examine witnesses," is held not to have been abused by allowing one of the attorneys for the plaintiffs to continue and complete the examination in chief of a witness after it had been commenced by the other attorney. *Id.*

25. Where, after a scaler mutually agreed upon by the parties to a logging contract had scaled a portion of the logs, his place was by agreement filled by another scaler, who scaled *all* of the logs, evidence of the reputation of the first scaler is immaterial in a suit involving the correctness of the last scale. *Id.* 383.

26. Title in a third person may be shown as a defense in an action of trover. *Wessels v. Beeman*, 481.

27. In the investigation of fraud it is usual to permit a wide range of investigation of matters that will throw light upon the question at issue, but irrelevant testimony is no more admissible in such cases than in any other investigation or trial of civil actions at law. *Id.*

28. In an action of trover by a vendee against an execution creditor of the vendor, the defendant cannot set up as a defense that the sale was in violation of the United States internal revenue laws, when neither of the parties has repudiated the contract, and it has been fully executed. *Id.*

29. The title of the United States to goods forfeited by reason of their sale in violation of the internal revenue laws is not consummated until after judicial condemnation, when it relates back to the time of the commission of the offense (*Caldwell v. United States*, 8 How. 381); and, in trover by the vendee for the conversion of the goods, evidence of such forfeiture, offered for the purpose of showing title in a third person, is inadmissible, unless supplemented by proof of such condemnation. *Id.*

30. The tendency of testimony to prove a disputed fact is exclusively for the jury, and it is error for the circuit judge to add the weight of his opinion as to what the testimony tends to prove. *Id.*

31. A creditor received from a debtor certain real-estate mortgages and a bill of sale of personal property in payment, as he claimed, of existing indebtedness. About two months afterwards the debtor made a general assignment of all his property to a third party for the benefit of his creditors, and

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the assignee sold the equity of redemption in the mortgaged premises at public auction, and the creditor (mortgagee) became the purchaser of a portion of the land covered by his mortgages. In a suit brought by the creditor against a *judgment* creditor of the debtor, who had sold the property covered by the bill of sale on execution, the defendant was permitted to prove said assignment and sale by the assignee, which testimony is held admissible; there also being testimony in the case tending to show that the debtor contemplated making the assignment before the transactions with the plaintiff. *Id.*

82. In a suit between a plaintiff claiming personal property under a bill of sale absolute on its face, and a creditor of the vendor, the jury may consider the fact that the vendee filed the bill of sale in the office of the township clerk of the proper township as evidence bearing upon the claim made by him that the transfer was absolute, and not by way of security. *Id.* 482.

83. The judgment of a crowd is not generally so accurate that evidence of its clamor can be admitted, unless the crowd and the party sought to be charged were acting in concert. *Kuhn v. Freund*, 545.

84. A witness of an assault cannot testify to his own conclusions, or to those of other on-lookers, or to the effect upon his mind of the assault, or to what "the people there desired," or that 'threats of personal violence" were made by others against the assailant. *Id.*

85. Epilepsy, irritation of the spinal cord, a depression of the inner table of the skull, and permanent mental disorder, cannot be said to be the ordinary results of an ordinary assault and battery, and unless specially alleged cannot be proved. *Id.* 546.

86. In a suit prosecuted against the surviving member of a banking firm, who denies its existence, but of which fact convincing evidence has been given, the statements of a cashier, whose general agency has been established, made to the plaintiffs, who contemplated making deposits, as to the existence of the firm, are admissible in evidence as part of the *res gestae*, as is plaintiffs' testimony that they made deposits in reliance upon the information thus received, and that from the time of such conversation they understood

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EVIDENCE—Continued.

that the surviving defendant and his deceased co-defendant composed the firm; the last point being ruled by *Parshall v. Fisher*, 43 Mich. 529. *Wright v. Weimeister*, 594.

37. Where on the dissolution of a banking firm, and the formation of a new one to continue the business, the certificate required by How. Stat. §§ 3128, 3129, giving the names of the members of the new firm, etc., is not filed with the county clerk, such omission cannot be shown by a surviving member of the new firm, in a suit involving the question of its existence, in support of a claim that until the filing of such certificate the old firm could not be legally dissolved and a new one formed. *Id.* 595.

38. The burden of proof to establish an alleged settlement of the plaintiff's claim is upon the defendant. *Hitchcock v. Davis*, 630.

39. Where in a suit by an attorney upon an agreement with a client, by which he was to receive a portion of certain claims in consideration of his rendering professional services, the client gives notice that he will show that the attorney neglected and refused to render said services, the burden of proof is upon the plaintiff to show performance on his part, or a readiness to perform, as soon as any evidence is introduced by the defendant tending to make out the defense set up in the notice. *Id.*

40. In such a case a receipt given for a specified sum on the settlement of a prior suit brought by the attorney to recover for professional services *generally*, in full of all claims in said suit, *and of all accounts*, is insufficient, standing alone, to warrant the court or jury in finding that it was given on a settlement of the claim sued for in the second suit. *Id.*

FEES—See SHERIFF'S FEES.

FEMALE—See COUNTY CLERK.

FIRE INSURANCE.

1. The homestead right of a husband (if any) in buildings which he has insured before conveying the land on which they stand to his wife is not an insurable interest within the meaning of the charter of an insurance company, which provides that the interest of the assured at time of a loss must

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FIRE INSURANCE—Continued.

be that of owner or mortgagee. *Glaze v. Three Rivers, etc., Ins. Co.*, 349.

2. The applicant for insurance has a right to rely upon the assumption that his policy will be in accordance with his oral application, and, if the insurer desires to make the policy in anything different, it must, in order to make it binding upon the assured, call his attention to the clauses differing from the application. *Gristock v. Royal Ins. Co.*, 428.

See MUTUAL FIRE INSURANCE COMPANIES.

FRAUD.

1. Complainant filed a bill to set aside an exchange of real estate owned by him for two mortgages upon a farm formerly owned by the defendant, and for the restoration of his property, for alleged fraud in the transfer because of the falsity of the representations which brought it about; and the Court find that the essential allegations of the bill are established by the testimony, and that complainant is entitled to the relief prayed for. *Goodrich v. Smith*, 1.

2. The decree of the court below, declaring that the deed sought to be set aside was executed to enable the complainant to secure a loan upon the land, and directing a reconveyance to him subject to the mortgage given to secure said loan, is affirmed. *Reilly v. Brown*, 168.

See EVIDENCE (27).

FRAUDULENT CONVEYANCES — See ASSIGNMENT FOR BENEFIT OF CREDITORS (1).

GARNISHMENT.

1. A disclosure admitting an indebtedness to the principal defendant of $1,717.28, unless the garnishees had become liable to other parties upon certain orders drawn upon them by the principal defendant, aggregating $2,800, is sufficient to enable the plaintiff to demand a trial of the statutory issue thus framed, under How. Stat. § 8068. *Hobson v. Kelly*, 187.

2. The question in this case is whether the indebtedness referred to in the disclosure was due at the time of the trial; and it is held that under the evidence a verdict was properly directed against the garnishee defendants. *Id.* 188.

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GENERAL REPUTATION—See ADVERSE POSSESSION (2).

GROSS MISTAKE.

The term "gross mistake," as used with reference to a log scale, is a mistake which is clearly shown to have left out some of the logs, or to have increased the scale by a mistake in the tally or in the addition of the amounts on the tally-sheets, or something of that nature, and not an honest error of judgment in the scaler. *Malone v. Gates*, 332.

GROSS NEGLIGENCE—See NEGLIGENCE (9).

GUARDIAN AND WARD.

1. No title passes by the sale and conveyance by a guardian at guardian's sale of the land of his ward, and its immediate reconveyance to him *individually* by the purchaser for the same consideration. *Winter v. Truax*, 324.
2. When the authority appears upon the face of the instruments, there is no presumption of honesty in a transaction by which the title of a *cestui que trust* is divested, and invested in the trustee. *Id.*

See MANDAMUS (1).

HIGHWAYS.

1. No appeal lies to the township board from the *refusal* of a highway commissioner to lay out a highway. *Wilson v. Township Board of Burr Oak*, 240.
2. The following propositions are summarized from the opinion of Mr. Justice LONG:

   a—An application to lay out a highway, which fails to state that the applicants are freeholders of the township, confers no jurisdiction upon the commissioner.

   b—The failure of the commissioner to show in his return that notice was served upon one of the occupants of the land through which the proposed highway is to be laid is fatal to the validity of his proceedings.

   c—It is error for a township board to hear an appeal from a highway commissioner when two of the sitting members are financially interested in the result of the appeal. *Id.*
3. The street-railway act of 1855 as amended (chapter 94, How. Stat.) confers no power upon a company organized under it to construct, maintain, and operate a railroad along the side of the traveled portion of a public country highway, with the

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HIGHWAYS—Continued.

consent of the township authorities, upon a road-bed not conforming to its grade, but made by means of cuts and fills, without compensation to abutting land-owners, at whose suit equity will perpetually enjoin the maintenance and operation of such a road. *Nichols v. Ann Arbor, etc., Street Ry. Co.*, 361.

HOMESTEAD.

The homestead right of a husband (if any) in buildings which he has insured before conveying the land on which they stand to his wife is not an insurable interest within the meaning of the charter of an insurance company, which provides that the interest of the assured at time of a loss must be that of owner or mortgagee. *Glaze v. Three Rivers, etc., Ins. Co.*, 349.

HUSBAND AND WIFE.

1. A husband has a sufficient title to the wearing apparel purchased by his wife with his money to enable him to maintain replevin against an officer who seizes it upon a tax warrant in satisfaction of a tax assessed against the wife upon her separate property. *Smith v. Abair*, 62.
2. A note given by a husband and wife, for a loan made and used for his benefit, is void as to the wife, in the absence of representations by her that it is made for her use and benefit. *Schmidt v. Spencer*, 121.
3. The fact that the husband asked for the loan as the agent of his wife is immaterial, in view of the fact that the lender knowingly took the note of both, as he will be charged with knowledge of the law voiding such a note as to the wife unless valid for reasons stated in former head-note. *Id.*

IDENTITY—See EVIDENCE (3).

INCOMPETENT PERSON.

1. Where, soon after the commencement of proceedings in probate court for the appointment of a guardian for an aged father as an incompetent person, he executed a deed of his home farm to a daughter in consideration of her agreement for his support, and a few weeks afterwards he was adjudged to be mentally incompetent by the judge of probate after a personal examination in said proceeding, and a guardian was

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INCOMPETENT PERSON—Continued.

appointed, who filed a bill to set aside the deed, in which suit the father was examined as a witness, and adjudged mentally incompetent by the circuit judge, the appellate court will require a strong showing before setting aside the findings of the two lower courts. *Sponable v. Hanson*, 204.

2. A decree setting aside a deed on the ground of the mental incompetency of the grantor to make it is sustained upon the testimony of the leading expert witness for the grantee that, when he privately examined the grantor, he did not know whether he had made a deed, a will, or a lease, and upon the opinion of the witness that the grantor was not competent to make a sale of his land for money, and protect his interest in it. *Id.*

8. A mortgagee of the grantee of an incompetent person, whose brother acted as her agent in making the loan secured by the mortgage, and who drafted the deed to the mortgagor, and was present at its execution, cannot be regarded as a *bona fide* mortgagee without notice, but the lien of the mortgage will be sustained to the extent of the money received by the incompetent person from the mortgagor on account of the mortgage. *Id.*

INSURANCE—See FIRE INSURANCE; MUTUAL BENEFIT ASSOCIATIONS; MUTUAL FIRE INSURANCE COMPANIES.

INTERNAL REVENUE LAW—See EVIDENCE (28, 29).

JOINT OBLIGATION.

1. Persons entering jointly into an undertaking may be copartners, and the joint interest makes them liable whether they are partners or not. *Purvis v. Butler*, 248.

2. The question whether a creditor who takes a share in the profits, for the use of money advanced, occupies the relation of creditor or partner, must be determined by the agreement of the parties, as between themselves, and, as to third persons who deal with them, must be measured by their rights. *Id.*

JURY.

When a verdict is directed by the court, an issue of law is raised upon the whole case, and the defeated party cannot

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JURY—Continued.

claim the right to poll the jury. *Donoghue v. Ind. & Lake Mich. R'y Co.*, 18.

See DAMAGES (3).

LANDLORD AND TENANT.

1. The relation of general tenancy at will cannot be terminated by either party without notice to the other; and the tenant cannot, without justifiable cause, abandon the premises, and treat it as a surrender, without giving the notice required by the statute. *Huntington v. Parkhurst*, 88.
2. A tenant at will, until the tenancy is legally terminated by notice, is bound to pay for the use and occupation, and the mere vacating of the premises during the term, or while the tenancy exists, will not exonerate him from such payment. *Id.*
3. Where the purchaser of a stock of goods went into possession of the store building in which they were contained under a verbal agreement with the owner to execute to the purchaser a written lease of the premises for a term of one year, with the privilege of three or five years, at an agreed yearly rental, payable in monthly installments, which lease the purchaser agreed to accept and enter into, and without any other agreement or understanding occupied the store for two months, and paid the stipulated rent, such action is held to have converted the holding into a tenancy of one year at all events, with an additional term, depending upon the election of the lessee, as to which he was a tenant at will from year to year. *Id.*
4. The court is held to have erred in finding as matter of law, upon plaintiff's testimony, that the defendants had surrendered possession of a mill leased of the plaintiff prior to its destruction by fire, and that its care had been assumed by the plaintiff; plaintiff not having rested his case, and not claiming to be entitled to recover upon the case then presented, and having advanced no theory inconsistent with the case set forth in his declaration. *Stevens v. Pantlind*, 476.

LIBEL AND SLANDER.

1. Spoken words are defamatory without allegation of special damages when the imputation cast by them on the plaintiff is so injurious that the court will presume without proof

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LIBEL AND SLANDER—Continued.

that his reputation has thereby been impaired; which presumption will arise when the words are spoken of plaintiff in the way of his profession. *Mains v. Whiting*, 172.

2. The words, "You are the dirty sewer through which all the slums of this embezzlement have flowed," addressed to an attorney at law who is at the time conducting the defense of a client charged with such embezzlement, are actionable *per se*, if shown by the plaintiff to have been spoken of and concerning him in the way of his profession or employment. *Id.*
3. In a libel suit it appeared that the article complained of was libelous *per se*, and the malice of the defendant plainly appeared from the face of the publication. And it is held that the failure of the court to instruct the jury to consider, as affecting the question of exemplary damages, the claim of the defendant, supported by his testimony, that he was informed prior to publishing the article that the charges therein made were true, as showing his good faith, was non-prejudicial error; it appearing that the jury were instructed to consider the mitigating circumstances in the case, which were only shown by said testimony. *Orth v. Featherly*, 315.
4. A publication alleging that a member of the board of supervisors charged a co-member during a meeting of the board with being a liar, a thief, and a perjurer, and stated that he could prove it, is libelous *per se*. *Id.*
5. Where actual malice is shown in an action for slander or libel, the jury may always give punitive damages. *Id.*

LICENSE TO CUT TIMBER.

1. While the absolute title to standing timber in this State will not pass except by deed, in the same manner as the fee of the land, a license to enter and cut and remove such timber can be given, which, unless revoked before the timber is cut, and thereby converted into personalty, will pass the title to so much as has been severed from the soil. *White v. King*, 107.
2. A bill of sale to a third person of standing timber, with license to cut and remove it, is no more than a license, and will not operate as a revocation of a former license, until notice is given to the first licensee. *Id.*

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LIEN—See CHATTEL MORTGAGE (1); EQUITABLE LIEN; LOG-LIEN LAW.

LIQUOR TRAFFIC.

1. In a suit by a wife against a saloon-keeper and his bondsmen to recover damages sustained by reason of the killing of her husband by an intoxicated person alleged to have procured his liquor of the defendant saloon-keeper, evidence showing that the slayer of the husband was a person in the habit of becoming intoxicated is admissible for the purpose of showing that the sale of the liquor was unlawful. *Doty v. Postal*, 143.
2. Where the evidence in such a case is contradictory as to which party to the affray was the aggressor, the question should be submitted to the jury. *Id.*
3. It is not for the plaintiff to produce proof, or for the jury to speculate, upon the probabilities whether the intoxication of the husband's slayer was the natural cause of the killing. The act itself fixes defendant's liability, if the sale of the liquor was wrongful. *Id.*

LOG-LIEN LAW.

1. In an attachment suit under the log-lien law of 1887 (Act No. 229) it is not necessary to appraise the property, or to serve a *certified* copy of the writ or the inventory upon a log-owner who is not the defendant in the suit; such service being governed by section 6 of the act. *Federspiel v. Johnstone*, 303.
2. The lien of a laborer under the log-lien law of 1887 does not depend upon the state of the accounts between the contractor for whom he labors and the log-owner, whose liability is limited to the contract price, which he pays to the contractor at his peril. *Id.*
3. The correction by the court of a verdict in a log-lien suit in excess of plaintiff's claim by entering a judgment for a smaller sum, and less than the amount shown to be due plaintiff on the trial, is held not to authorize the granting of a new trial. *Id.*

See COSTS (2).

LOGS AND LOGGING.

1. Upon proof of the death of a scaler mutually agreed upon

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LOGS AND LOGGING—Continued.

by the parties to a logging contract, his scale, if free from fraud or *gross* mistake, is admissible in evidence in a suit upon the contract, and is binding upon both parties. *Malone v. Gates*, 332.

2. The scale of a deceased scaler mutually agreed upon by the parties to a logging contract is presumed to be correct, fair, and honest, but if evidence is introduced tending to show the contrary, or that there is a *gross* mistake in the scale, the burden is upon the party claiming under it to establish its correctness. *Id.*

3. The term "gross mistake," as used with reference to a log scale, is a mistake which is clearly shown to have left out some of the logs, or to have increased the scale by a mistake in the tally or in the addition of the amounts on the tally-sheets, or something of that nature, and not an honest error of judgment in the scaler. *Id.*

4. Where the scale of a deceased scaler is received in evidence, it is competent for witnesses who were present when the scale was made to testify to the manner of its making, and what they did and knew about it, and what the scaler did and said while making it; and the declaration of the scaler against the correctness or honesty of his scale may also be shown. *Id.*

5. Where logs which were not delivered at the time fixed by the contract, because "hung up" by reason of low water, were received the following year without any demur or protest on account of such delay, but payment was refused because the scale was disputed, such non-delivery is not a substantial breach of the contract. *Id.*

6. Where, after a scaler mutually agreed upon by the parties to a logging contract had scaled a portion of the logs, his place was by agreement filled by another scaler, who scaled *all* of the logs, evidence of the reputation of the first scaler is immaterial in a suit involving the correctness of the last scale. *Id.* 333.

See LOG-LIEN LAW.

MANDAMUS.

1. A *mandamus* to compel respondent to enter an order as of the date of filing an election by the guardian of a testator's widow to take under the statute, instead of the will of her

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MANDAMUS—Continued.

deceased husband, she being at the time a mentally incompetent person, setting forth the proceedings had before respondent, and sanctioning, consenting to, and ratifying the filing of said election, is denied, the findings of fact made on the hearing and denial of the petition for said order showing that the election was drawn by the register of respondent's court, and signed and filed by the guardian after consultation with the court, and with its knowledge and consent, but not by its order or direction; which findings are held a sufficient record to show that the election was made and filed with the knowledge and consent of the probate court, and to have the like effect as if made when the election was filed. *Bassett v. Durfee*, 167.

2. The determination of the issues presented by the pleadings in this case involves an investigation of long accounts between the township and county, and a reference is ordered to the circuit court of Saginaw county, to the end that the account may be stated, and the facts submitted in a form which will not require the time and attention of the Supreme Court in investigating the array of figures presented. *Haines v. Supervisors of Saginaw Co.*, 237.
3. It is further held that this is a case which may properly be referred by the circuit court to a referee under How. Stat. § 7878. *Id.*
4. After a respondent was convicted of murder, which conviction was reversed, he was admitted to bail. Pending his second trial he was ordered into custody, and a *mandamus* to compel the circuit judge to admit him to bail is denied. *Hull v. Wayne Circuit Judge*, 497.

MARRIED WOMAN.

1. A husband has a sufficient title to the wearing apparel purchased by his wife with his money to enable him to maintain replevin against an officer who seizes it upon a tax warrant in satisfaction of a tax assessed against the wife upon her separate property. *Smith v. Abair*, 62.
2. A note given by a husband and wife, for a loan made and used for his benefit, is void as to the wife, in the absence of representations by her that it is made for her use and benefit. *Schmidt v. Spencer*, 121.
3. The fact that the husband asked for the loan as the agent

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MARRIED WOMAN—Continued.

of his wife is immaterial, in view of the fact that the lender knowingly took the note of both, as he will be charged with knowledge of the law voiding such a note as to the wife unless valid for reasons stated in former head-note. *Id.*

MASTER AND SERVANT—See NEGLIGENCE (3–5, 10, 14–17).

MENTAL COMPETENCY—See INCOMPETENT PERSON.

MISTAKE—See GROSS MISTAKE.

MORTGAGE.

A mortgagee of the grantee of an incompetent person, whose brother acted as her agent in making the loan secured by the mortgage, and who drafted the deed to the mortgagor, and was present at its execution, cannot be regarded as a *bona fide* mortgagee without notice, but the lien of the mortgage will be sustained to the extent of the money received by the incompetent person from the mortgagor on account of the mortgage. *Sponable v. Hanson*, 204.

See CHATTEL MORTGAGE.

MUNICIPAL CORPORATIONS.

1. The authority given to the board of public works of the city of Grand Rapids, by section 8 of Act No. 321, Laws of 1873, to determine as to the *particular kind and quantity* of materials to be used in the construction of any public work the construction of which the common council has declared to be a necessary improvement, has reference to *detail*, and not to the *general character* of the work. *Common Council of Grand Rapids v. Board of Public Works*, 118.
2. It is unquestionably the duty of the common council to avail itself of whatever information or knowledge the board of public works possesses in determining the general character of a public work, but the authority for the expenditures necessary to its construction must originate with the council, and includes the right to determine the question of cost, dimensions, and general character. *Id.*
3. The judgment of a city council upon a question of parliamentary law will not be disturbed by the courts. *Davies v. City of Saginaw*, 439.
4. The declaration of the necessity for a public improvement does not necessarily involve the enumeration of its details,

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MUNICIPAL CORPORATIONS—Continued.

but, although general in character, covers the doing of whatever is deemed or found to be necessary in the course of an improvement of the character designated. *Id.*

5. After the common council of a city had ordered a street to be paved, and had approved the plans and specifications for the improvement, and the board of public works had advertised for proposals for doing the work, the council adopted the report of a committee recommending that the letting of a contract be deferred until provision was made for sewerage, and, after bids had been received under the advertisement, the council adopted a resolution directing the board to readvertise for proposals, which was not done, but the board reported the bid received, and the council directed it to enter into a contract with the bidders. And it is held that the council had power to suspend, defer, or postpone the work, and to resume it as well, the exercise of which power was entirely within its discretion, without reference to the reason which led to such postponement. *Id.*

6. In matters involving the discretion or judgment of a common council, where no bad faith or fraud is alleged, parties cannot go behind the recorded vote to show either want of knowledge or of good judgment. *Id.* 440.

7. The validity of a special assessment does not depend upon the fact whether or not the members of the council have viewed the property assessed, or the assessment district, with reference to that particular action. *Id.*

8. Aldermen are supposed to have a general knowledge of the geography, as well as the topography, of their own city, and to know the location and condition of its streets, and are supposed to act upon information furnished by committees, whose duty it is to collect *data* and arrange details. *Id.*

9. The validity of a special assessment is not affected by the fact that the assessor or city engineer furnished the information or *data* upon which the council acted, or because the officers actually outlined the assessment district, provided their action was adopted, approved, and confirmed by the council. *Id.*

10. The resolution of the common council fixing the assessment district, and declaring the amount to be assessed thereon, for a special improvement, is a legal determination

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MUNICIPAL CORPORATIONS—Continued.

(under a charter authorizing such action) that the benefit conferred upon that district is equal to said amount, and the spreading of such sum upon the assessment roll, and the confirmation of the roll by the council, determines that the proportion of the aggregate benefit received by each parcel is equal to the burden imposed; and, in the absence of fraud, oppression, or manifest mistake, such determinations are conclusive. *Id.*

11. The proceedings of the common council recited that the amount assessed to a street-car company on account of paving a street represented the cost of paving between the company's tracks, pursuant to the provisions of a specified section of an ordinance authorizing the location and maintenance of the company. And it is held that, as the ordinance is not set forth in the record, it will be presumed that by its terms the company was liable to the assessment ordered, rather than upon the basis of benefits derived from the improvements. *Id.*

MUTUAL BENEFIT ASSOCIATIONS.

A provision in the laws of a mutual benefit association that the decision of a tribunal created by the constitution to pass upon death claims shall be final, and bar any suit at law or in equity therefor, is sustained, as within the ruling in *Van Poucke v. Society*, 63 Mich. 378. *Canfield v. Great Camp of Knights of Maccabees*, 626.

MUTUAL FIRE INSURANCE COMPANIES.

Where the charter of a mutual fire insurance company provides for the withdrawal of a member by returning his policy to the secretary, and paying all assessments to which he is then liable, such withdrawal cannot be effected so as to release the member or the company from liability without surrender of the policy. *Schroeder v. Farmers' Fire Ins. Co.*, 310.

NEGLIGENCE.

1. A passenger who, by reason of the crowded condition of a street-car and of the rear platform, is obliged to ride on the front platform, has a right to do so in the absence of regu-

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NEGLIGENCE—Continued.

lations to the contrary, and is not guilty of negligence in so doing. *Archer v. Fort Wayne & Elmwood Ry. Co.*, 101.

2. It is a question of fact for the jury to determine whether or not such manner of riding is so dangerous that the company, in discharging its duty to the public, should construct some kind of a guard to prevent passengers from being thrown from the car, and the question of the negligence of a passenger, *while so riding*, and of the company, should be submitted to the jury under proper instructions. *Id.*

3. An employé who, with knowledge of the fractious disposition of a horse, drives him within five feet of a moving locomotive, from which steam is escaping, is guilty of such contributory negligence as will defeat a recovery for injuries sustained by reason of the consequent frightening of the horse. *Mahan v. Clee*, 161.

4. The question of the negligence of a railroad company in directing, by its assistant road-master, its sectionmen to load steel rails lying along the track onto moving flat-cars, should have been submitted to the jury, under the circumstances of this case. *Palmer v. Mich. Central R. R. Co.*, 281.

5. It was error to refuse to permit the plaintiff to show how many of the sectionmen thus employed had had no experience in that particular kind of work, the severity of the work, whether any of the men gave out before the accident to plaintiff, whether plaintiff could see the rail before it hit him, and that loading the rails onto moving cars was more dangerous than upon stationary cars. *Id.*

6. Plaintiff's intestate, a street-car driver, was killed at a railroad crossing by a collision with nine detached freight-cars, running at the rate of from 8 to 10 miles per hour, without any warning of their approach other than the noise made in running. The flagman was not at his usual post of duty, and gave no warning of danger until the horse was upon the crossing. After leaving another railroad crossing, about 185 feet from the one where the accident occurred, the driver could not have seen the approaching freight-cars until within about 20 feet of the crossing where he was killed, and he did not look in the direction from which the cars were approaching, after reaching said point, until his horse was upon the track. And it is held that the question of his negligence (that of the defendant being apparent) was for

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NEGLIGENCE—Continued.

the jury, who were to determine whether, under the circumstances, the driver had the right to rely, and how far, upon the absence of the flagman from his post of duty, and the want of any signal of danger from him, as an assurance of safety; and, if they found that an ordinarily prudent man would have acted as the driver did, the plaintiff could recover. *Richmond v. Chicago & West Mich. R'y Co.*, 374.

7. In an action against a railroad company under How. Stat. §§ 3391, 3392, for the negligent killing of the plaintiff's intestate, the damages recoverable are limited to the pecuniary injury sustained by the persons entitled to share in the distribution of his personal estate (*Van Brunt v. Railroad Co.*, 78 Mich. 530; *Hurst v. City Railway*, 84 Id. 539); which distribution is governed by the statute existing at the time of the death of the intestate. *Id.*

8. The following general propositions are summarized from the majority opinion of Mr. Justice MORSE:

a—It is not the law of this State that, under all circumstances, it is absolutely necessary for a person approaching a railroad crossing to look both ways and to listen for approaching trains.

b—A traveler is not compelled, under all circumstances, to stop before crossing the track, if his view is obstructed from one way. He is required to take such precaution as an ordinarily prudent man would under like circumstances, and whether he did use such care is generally a question for the jury. *Id.* 375.

9. In this case the finding of the jury that the defendant was guilty of gross negligence in the management of certain detached freight-cars, to the injury of the plaintiff, who had not arrived at the age of accountability, is held to have been warranted by the evidence and circumstances surrounding the case, as set forth in the opinion. *Schindler v. Milwaukee, etc., R'y Co.*, 400.

10. Plaintiff, while pulling down an iron door which was moved by means of a chain running over pulleys, and fastened to the top of the door, a weight being attached to the other end of the chain, was injured by its falling upon him. The chain broke, and on inspection it was found to have been connected together at one point with coils or strands of wire, which had broken or pulled apart. Plaintiff

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NEGLIGENCE—Continued.

was unaware of the existence of this wire connection, and one of his fellow-servants, who had been in defendant's employ for eight years, testified to his want of such knowledge, and that he had never known of any repairs or inspection of the chain. And it is held that plaintiff made a sufficient showing to go to the jury. *Tangney v. J. B. Wilson & Co.*, 453.

11. The law does not presume that a jury in a negligence case, which found a verdict for the plaintiff notwithstanding erroneous instructions by the court upon the law of negligence, were prejudiced thereby in their assessment of damages. *Kalembach v. Mich. Central R. R. Co.*, 509.

12. A declaration in a negligence case in which the only allegations of special damages were "that plaintiff had been put to great expense in procuring medicine, medical attendance, and care, in which he had expended the sum of $500 for physicians' services, nurses, and help," and that he was "greatly and permanently injured, suffered great physical and mental pain, and became sore, sick, lame, and languishing," is not sufficiently specific to admit testimony of any permanent injury. *Id.*

13. The question of the contributory negligence of the owner of a runaway team, who takes it into a railroad freight-yard, and in close proximity to tracks over which cars are liable to pass at any time, is to be determined by the jury. *Id.*

14. Constructing and maintaining a side track so near to a building in the yards of a railroad company, and under its control, as to endanger the lives of its employés while switching cars on said track, is a violation of the duty of the company to provide a safe place for its employés to work in. *Sweet v. Mich. Central R. R. Co.*, 559.

15. Where in such a case an employé is killed by being crushed between the car upon which he was braking and the building, and the testimony fails to show that he had ever before switched a car on said side track or past the building, or that he had any reason to apprehend the existence of such *special* danger, it is a question for the jury, under all of the testimony, to determine whether he knew or ought to have known of such danger. *Id.*

16. A master is liable for injuries to servants that spring from

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NEGLIGENCE—Continued.

such negligent acts of fellow-servants as are due to their incompetency; citing *Hilts v. Railway*, 55 Mich. 437; and where in a negligence case there is evidence tending to show such incompetency, the question should be submitted to the jury. *Lee v. Mich. Central R. R. Co.*, 574.

17. The following general propositions are summarized from the opinion of Mr. Justice MCGRATH:

a—Employers may be negligent in the *selection* of servants as well as in their *retention*.

b—In the absence of any evidence as to the exercise of care in his selection, proof that a servant who has been in the service but two or three weeks was incompetent when employed need not be supplemented by proof of the master's knowledge of his incompetency.

c—Where a servant competent at the time of his employment becomes incompetent, or indulges in a habit which renders him incompetent during its indulgence, notice of such incompetency or habit must be brought home to the master, or it must be so notorious as to charge the master with knowledge; but when the incompetency existed at the time of the employment, proof of notice to the master is unnecessary. *Id.*

18. It has never yet been announced as negligence *per se* to cross a railroad track in a public highway either in the front or rear of a standing engine and tender; and whether it is negligence to turn one's back upon the rear of such engine and tender, and take a few steps away from them (walking between the tracks), depends upon the circumstances of the particular case in which it is done, and, if so, the determination of the question is very appropriately one for a jury. *Fehnrich v. Mich. Central R. R. Co.*, 606.

19. One put suddenly in peril is not imperatively required to do that which, after the peril is ended, it is seen he might have done and escaped. The law makes allowance for the fright and lack of coolness of judgment incident to such a peril. *Id.*

20. A street-railway company is not guilty of negligence in allowing material taken from between its rails while repairing its track to remain in the street along-side its track for a few hours (five or six in this case) in the day-time. *Zanger v. Detroit City R'y Co.*, 646.

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NEGLIGENCE—Continued.

21. One who knows that a street-railway track is being repaired, and sees an obstruction in the street by reason of such repairs, and drives over the same on a trot, without any consideration that a high, loose box upon which he is sitting might be thereby thrown out of the wagon, is guilty of such contributory negligence as will bar a recovery for injuries thereby sustained. *Id.*

NEXT FRIEND—See COSTS (1).

OFFICERS.

The office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, his choice is not confined to any race, *sex*, color, or age. *Wilson v. Genesee Circuit Judge*, 498.

PARLIAMENTARY LAW—See MUNICIPAL CORPORATIONS (8).

PAROL TESTIMONY—See EVIDENCE (6, 7, 13, 14).

PARTIES.

Where, after the commencement of a suit against two partners, one of them dies, the suit is properly revived and prosecuted to judgment against the surviving defendant, the administrator of the deceased defendant not being a necessary party. How. Stat. § 7401. *Van Kleeck v. McCabe*, 600.

PARTNERSHIP.

1. In a suit by a firm composed of two members to recover a balance due on a building contract, it appeared that the defendant contracted entirely with one partner, but that all of the bills were rendered to him in the firm name. And it is held that a request for an instruction that, before the plaintiffs could recover, the jury must be satisfied that the defendant contracted with the *firm*, was properly refused. *McDonnell v. Ford*, 198.
2. In a joint obligation, each person is bound for its entire fulfillment, and, in the absence of a plea in abatement, may be proceeded against to judgment and execution. *Purvis v. Butler*, 248.

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PARTNERSHIP – Continued.

3. Persons entering jointly into an undertaking may be copartners, and the joint interest makes them liable whether they are partners or not. *Id.*

4. The question whether a creditor who takes a share in the profits, for the use of money advanced, occupies the relation of creditor or partner, must be determined by the agreement of the parties, as between themselves, and, as to third persons who deal with them, must be measured by their rights. *Id.*

5. Parties who have advanced money for the prosecution of a business, and agree to make further advances, and to receive interest on the indebtedness thus created, and also to receive and apply the profits in its liquidation, succeed to the entire proprietorship of the business, and are liable as partners to third persons upon contracts entered into in carrying on the same. *Id.*

6. A provision in copartnership articles for the appointment of the husband of one of the partners as her agent, with like powers as she might exercise were the appointment not made, and that the husband shall devote his time and services to the business of the firm, in lieu of those of his wife, clothes him with the general authority of a partner. *Meyer v. Montgomery*, 278.

7. In a suit prosecuted against the surviving member of a banking firm, who denies its existence, but of which fact convincing evidence has been given, the statements of a cashier, whose general agency has been established, made to the plaintiffs, who contemplated making deposits, as to the existence of the firm, are admissible in evidence as part of the *res gestae*, as is the plaintiffs' testimony that they made deposits in reliance upon the information thus received, and that from the time of such conversation they understood that the surviving defendant and his deceased co-defendant composed the firm; the last point being ruled by *Parshall v. Fisher*, 43 Mich. 529. *Wright v. Weimeister*, 594.

8. Where on the dissolution of a banking firm, and the formation of a new one to continue the business, the certificate required by How. Stat. §§ 3128, 3129, giving the names of the members of the new firm, etc., is not filed with the county clerk, such omission cannot be shown by a surviving member of the new firm, in a suit involving the question of

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PARTNERSHIP—Continued.

its existence, in support of a claim that until the filing of such certificate the old firm could not be legally dissolved and a new one formed. *Id.* 595.

9. An assignment by one partner of *his* property for the benefit of his creditors, which does not purport to convey the partnership property, gives the assignee no title to said property or right to its possession. *Van Kleeck v. McCabe*, 599.

10. Where, in a suit involving the question of the existence of a partnership between the defendants, one dies, and the suit is revived and prosecuted against the surviving defendant alone, a judgment establishing the existence of the partnership is not binding upon the administrators of the deceased defendant. *Id.*

11. Third persons who deal with parties who represent themselves as partners in a business are entitled to have the property used in that business applied to the payment of their debts in preference to the individual debts of such parties. *Id.* 600.

12. One partner cannot avoid liability for the firm debts by proof that he was induced to enter into the partnership relation by the false statements of his copartner as to the value of the firm property. *Id.*

13. One partner cannot avoid liability in a suit brought against the firm, which he defends as survivor, by showing that he disclaimed all interest in the property, and assented to its assignment by his copartner as his individual property for the benefit of *his* creditors; and the same rule obtains where such partnership exists as to third persons, although not *in fact* as between the parties themselves. *Id.*

14. Where, after the commencement of a suit against two partners, one of them dies, the suit is properly revived and prosecuted to judgment against the surviving defendant, the administrator of the deceased defendant not being a necessary party. *Id.*

15. The presentation of a claim against a partnership for allowance against the estate of one of the partners, who has died since the commencement of a suit against the firm for its collection, will not operate as an abandonment of the suit. *Id.*

16. A diligent creditor, who has secured a lien by instituting

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PARTNERSHIP—Continued.

proper legal proceedings, is not deprived of it by the death of one of his debtors, if the suit is revived and prosecuted to judgment in the manner provided by law. *Id.*

17. All of the acts of a surviving partner, and the result of suits brought by or against him as a survivor, are binding upon the representatives of the deceased partner, so long as they are conducted in good faith. *Id.*

PAYMENT—See CHARGE TO JURY (2); CHATTEL MORTGAGE (5).

PLEADING.

1. In a joint obligation, each person is bound for its entire fulfillment, and, in the absence of a plea in abatement, may be proceeded against to judgment and execution. *Purvis v. Butler*, 248.
2. A declaration in a negligence case in which the only allegations of special damages were "that plaintiff had been put to great expense in procuring medicine, medical attendance, and care, in which he had expended the sum of $500 for physicians' services, nurses, and help," and that he was "greatly and permanently injured, suffered great physical and mental pain, and became sore, sick, lame, and languishing," is not sufficiently specific to admit testimony of any *permanent* injury. *Kalembach v. Mich. Cent. R. R. Co.*, 509.

See EVIDENCE (35).

POSSESSION OF LAND—See ADVERSE POSSESSION.

PRACTICE IN CIRCUIT COURT.

1. The discretion of the trial judge in the enforcement of Circuit Court Rule No. 63, which provides that "one counsel only on each side shall examine and cross-examine witnesses," is held not to have been abused by allowing one of the attorneys for the plaintiffs to continue and complete the examination in chief of a witness after it had been commenced by the other attorney. *Malone v. Gates*, 332.
2. It is not proper for counsel upon either side to attempt to play either upon the pride or prejudices of the jury; but where the attorney for the losing party is the aggressor in matters of this kind, thereby challenging a reply from his opponent, the Court is not called upon to punish the latter's client for an indiscretion of his counsel thus called out in

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PRACTICE IN CIRCUIT COURT—Continued.

the heated trial of an important cause, unless it appears quite plainly that the verdict was influenced thereby. *Sweet v. Mich. Central R. R. Co.*, 559.

PRACTICE IN SUPREME COURT.

1. Where, soon after the commencement of proceedings in probate court for the appointment of a guardian for an aged father as an incompetent person, he executed a deed of his home farm to a daughter in consideration of her agreement for his support, and a few weeks afterwards he was adjudged to be mentally incompetent by the judge of probate after a personal examination in said proceeding, and a guardian was appointed, who filed a bill to set aside the deed, in which suit the father was examined as a witness, and adjudged mentally incompetent by the circuit judge, the appellate court will require a strong showing before setting aside the findings of the two lower courts. *Sponable v. Hanson*, 204.
2. An objection that proof that the defendants in an attachment suit are copartners is inadmissible, because not charged to be such in the affidavit for the writ and in the declaration, but simply as joint debtors, cannot be raised for the first time in the appellate court. *Wright v. Weimeister*, 594.

PRINCIPAL AND AGENT.

1. One who has acted as agent for another, and kept his own accounts, knows, if anybody does, how much money he has paid out, and what obligations he has assumed, in behalf of his principal, and what portion he has paid and discharged and what remains unpaid, and the account is not a mutual one; hence equity has no jurisdiction of a suit by the agent for an accounting. *Nash v. Burchard*, 85.
2. This case involves the question of the authority of a third party to act as agent for the owners in the sale to plaintiff of standing timber which the owner afterwards sold to the defendant, which question it is held should have been submitted to the jury upon the testimony. *White v. King*, 107.
3. A debtor, in anticipation of approaching death, sent an agent to adjust the claim of his creditor, to whom he had conveyed 20 acres of land many years before, and after the debt was incurred, by a deed absolute on its face, of which fact the creditor (a brother of the grantor) was first advised

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PRINCIPAL AND AGENT—Continued.

on receiving the deed by mail after it had been recorded, there being no agreement or understanding between them as to its execution. The agent, who was also directed to secure a reconveyance of the land, adjusted the claim, and took a quitclaim deed of the land in the name of the debtor's wife, and on his return made his report and exhibited the deed to his principal, who expressed himself as satisfied, and thereupon executed a deed to his only child, a daughter, of other land owned by him. And it is held that in the absence of any showing that the agent disobeyed his instructions, or of collusion with the wife, he will be presumed to have acted in good faith, and in accordance with his instructions, and the principal will not be presumed to have been ignorant of the action of his agent. *Crittenden v. Canfield*, 152.

4. A provision in copartnership articles for the appointment of the husband of one of the partners as her agent, with like powers as she might exercise were the appointment not made, and that the husband shall devote his time and services to the business of the firm, in lieu of those of his wife, clothes him with the general authority of a partner. *Meyer v. Montgomery*, 278.

See EVIDENCE (36).

PRINCIPAL AND SURETY.

1. A surety, who receives an agreed security for his indorsement of the principal's notes, cannot, until he has paid them, call upon the principal for any additional security, nor can he ask for any different contract for security than that which he originally received. *Nash v. Burchard*, 85.
2. In order to secure a surety, the principal inserted an agreement in her will to pay to him upon her death $5,000, which she declared should be a first lien upon the estate she should leave at her death, and directed her executor to pay said sum to the surety out of *said* estate after paying her funeral expenses. And it is held that the provision in no way interfered with the disposition or use by the testatrix of any or all of the property she possessed when the will was made, and that the lien only attached to the estate remaining at her death. *Id.*
3. Neither a contract creditor nor a surety can, by proceedings in equity, compel his debtor or principal to turn his property

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PRINCIPAL AND SURETY—Continued.

over to a receiver to secure a debt or satisfy it before obtaining judgment and exhausting his remedy at law. *Id.*

PROCESS.

There is no reason why the mere filling out of a summons by an attorney after it is signed and sealed by the clerk, where no abuse is shown, should vitiate the writ. *Potter v. Hutchison Manfg. Co.*, 59.

RAILROAD COMPANIES.

1. The ownership of a railroad company in its tracks upon a public street crossing is not such as to make a man a trespasser unless he travels squarely across them. *Fehnrich v. Mich. Central R. R. Co.*, 606.
2. If the language used in the majority opinion in *Kelly v. Railroad Co.*, 65 Mich. 186, is to be so construed that a man, while walking in the street, cannot go diagonally across a railroad crossing, or, if he wishes to leave the street at that point, cannot walk between the tracks in so doing, without being a trespasser, I must respectfully decline to be bound by it. Per MORSE, J. *Id.*

See NEGLIGENCE (4–9, 13–15, 18).

RECEIPT—See EVIDENCE (40).

RECORDING—See DEED (2).

REFORMING DEED—See EQUITY JURISDICTION.

REPLEVIN.

1. Evidence of the disposition made of chattel-mortgaged property after its replevin by the mortgagee is immaterial to the issue, the rights of the parties being fixed by the situation at the time the writ issued. *Rosenfield v. Case*, 295.
2. The Michigan replevin statute expressly provides for a return of the property to the defendant if he so elect, and the bond also expressly provides for a return of the property. These provisions of the law were idle if it were the intention to give to the plaintiff the absolute right to a disposal of the property. *Mannausau v. Wallace*, 543.
3. Although the property is delivered to the plaintiff, it still remains in the custody of the law, and, if a judgment for its return pass in favor of the defendant, he may recover it

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REPLEVIN—Continued.

by execution if found within the jurisdiction of the court, and, if not, by replevin, and it is immaterial whether the defendant purchased it in good faith or not. *Id.*

4. The language used in *Cary v. Hewitt*, 26 Mich. 236, must be construed in reference to the facts, which were entirely different from those in this case, and the statement that the bond "in a special sense" becomes a substitute for the goods is very far from saying that the title had passed to the plaintiff. *Id.*

5. A purchaser from the defendant in a replevin suit, to whom the property has been returned by virtue of a judgment in his favor for such return, is bound by a *final* judgment in favor of the plaintiff. *Hoppin v. Avery*, 551.

See CHATTEL MORTGAGE (2–6); HUSBAND AND WIFE (1).

REPUTATION—See EVIDENCE (5, 25).

RES JUDICATA.

1. A purchaser from the defendant in a replevin suit, to whom the property has been returned by virtue of a judgment in his favor for such return, is bound by a *final* judgment in favor of the plaintiff. *Hoppin v. Avery*, 551.

2. Where, in a suit involving the question of the existence of a partnership between the defendants, one dies, and the suit is revived and prosecuted against the surviving defendant alone, a judgment establishing the existence of the partnership is not binding upon the administrators of the deceased defendant. *Van Kleeck v. McCabe*, 599.

3. All of the acts of a surviving partner, and the result of suits brought by or against him as a survivor, are binding upon the representatives of the deceased partner, so long as they are conducted in good faith. *Id.* 600.

4. A provision in the laws of a mutual benefit association that the decision of a tribunal created by the constitution to pass upon death claims shall be final, and bar any suit at law or in equity therefor, is sustained, as within the ruling in *Van Poucke v. Society*, 63 Mich. 378. *Canfield v. Great Camp of Knights of Maccabees*, 626.

See DEED (2).

REVENUE LAWS—See EVIDENCE (28, 29).

REVIVOR—See ESTATES OF DECEASED PERSONS; PARTIES.

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RIPARIAN RIGHTS—See WATERS AND WATER-COURSES.

SALARY.

A board of supervisors has no power to allow the sheriff an annual salary for services "as jailer," including those for which the statute has provided fixed fees. *Plummer v. Township of Edwards*, 621.

SALE.

1. The lessee of a flouring-mill agreed to furnish certain machinery to be used therein during the continuance of the lease, which machinery was not to be removed if the lessors paid the lessee the purchase price. During the life of the lease the lessee mortgaged the machinery, and after its expiration agreed to apply certain indebtedness due the lessors upon the purchase price of the machinery, and to receive the balance in performance of the non-removal condition in the lease. The lessee executed a bill of sale of the machinery to the lessors, in which he stated that it was free from incumbrance, and the vendees tendered him his past-due note given to a third party, upon which they had indorsed the said balance, in payment thereof, which note the lessee refused to accept, and the mortgagee replevied the machinery from the vendees after a demand and refusal. And it is held that the payment or tender of the balance of the purchase price was a condition precedent to the passing of title, and that the tender of the note was not a performance of said condition, nor binding upon the lessee or his mortgagee, and that a verdict was properly directed in favor of the plaintiff. *Hughes v. Daniells*, 190.
2. Evidence of a parol agreement made after the execution of a written contract for the purchase of the cut of a shingle-mill, and for the passing of title when the shingles were reported and paid for, by which the vendor was to ship shingles not so reported and paid for, the title to which was to pass on their shipment, is admissible, and the vendor can recover for shingles shipped under such latter agreement, but not for shingles loaded in a car and destroyed by fire prior to their shipment. *Summers v. Wagner*, 272.
3. Where, on the purchase of a stock of goods, it was agreed between the vendor and vendee and the vendee's father that, if he would advance $500 to his daughter to apply on

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SALE—Continued.

the purchase price, he should be repaid out of the first sales made by the vendee, who afterwards secured such loan by a chattel mortgage of the goods, the vendor is estopped from claiming any lien for the unpaid purchase money as against an assignee of the mortgage. *Finn v. Donahoe*, 292.

4. Possession is not conclusive evidence of title, and an unauthorized sale of personal property does not prejudice the owner unless he has done some act which is calculated to mislead the purchaser, whose only remedy is against the vendor under the implied warranty of title which accompanies a sale of personal property. *Hoppin v. Avery*, 551.

See EVIDENCE (28, 29); STATUTE OF FRAUDS.

SCALE—See EVIDENCE (21-23, 25).

SERVICE OF PROCESS—See LOG-LIEN LAW (1).

SETTLEMENT—See EVIDENCE (38, 40).

SHERIFF'S FEES.

A board of supervisors has no power to allow the sheriff an annual salary for services "as jailer," including those for which the statute has provided fixed fees. *Plummer v. Township of Edwards*, 621.

SPECIFIC PERFORMANCE.

Upon a rehearing of this case, the decree ordered on the first hearing is modified so as to entitle the complainant to the possession of the land upon payment, within 60 days from July 28, 1891, of the balance of the purchase price, less the amount of the mortgage, the payment of which he assumed, with interest from said date. *Munro v. Edwards*, 112.

STANDING TIMBER—See LICENSE TO CUT TIMBER.

STATE PRISON.

How. Stat. §§ 9703, 9704, governing debits and credits for good conduct or misconduct of convicts in the State prison, are held to contemplate:

a—That the rules in reference to the forfeiture of good time shall be plain, certain, and specific, and known to the inmates of the prison, and be adopted by the board of inspectors, and be of record.

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STATE PRISON—Continued.

b—That each convict's record as to loss of good time, and for what reason he has lost it, shall be made known to him monthly.

c—That the reports of the infractions of the rules shall be investigated each month at the regular meeting of the inspectors, and passed upon by them, and that a record shall be made of their action, so that the amount of lost time to be deducted from a convict's good time shall not rest upon any computation of the warden's clerk, but may be shown at once from the inspector's records; and the convict who is reported by the officers should be given, if he desires, an opportunity to be heard upon such reports. *In re William Walsh*, 466.

STATUTE OF FRAUDS.

Plaintiffs sued defendant for the breach of an agreement, which was reduced to writing but not signed, under which defendant agreed to sell and deliver, and plaintiff to receive and pay for, 5 car-loads of wood at a stated price per cord. Defendant further agreed to sell and deliver to plaintiffs as much more of the same kind of wood as they should order at the same price. After delivering eight car-loads further delivery was refused, and plaintiffs are held not entitled to recover. *Bryant v. Smith*, 525.

See CONTRACT (2).

STATUTES CONSTRUED.

1. An executor was sued in his *individual* character by the administrator of the estate of the widow of the testator for the conversion of certain bonds received from her after the testator's death, but before his will was probated. The executor inventoried the bonds as the property of the estate, and never claimed any personal interest in them. The administrator claimed that they were delivered to the executor for safe-keeping by the widow, who had received them as a gift from her husband during his life-time, which the executor denied, and claimed that the bonds were delivered to him with the understanding that he received them as the property of the estate, and with the free will and consent of the widow. And it is held (by the majority of the Court) that the real issue was between the two estates as to the

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STATUTES CONSTRUED—Continued.

ownership of the bonds, and that the executor was not disqualified from testifying as a witness under How. Stat. § 7545, which prohibits the *opposite party*, in a suit prosecuted or defended by the heirs or personal representatives of a deceased person, from testifying to facts equally within the knowledge of the decedent, but that an *heir of the widow* was so disqualified. *Penny v. Croul*, 15.

2. The authority given to the board of public works of the city of Grand Rapids, by section 8 of Act No. 321, Laws of 1873, to determine as to the *particular kind and quantity* of materials to be used in the construction of any public work the construction of which the common council has declared to be a necessary improvement, has reference to *detail*, and not to the *general character* of the work. *Common Council of Grand Rapids v. Board of Public Works*, 113.

3. It is not necessary to issue and have returned unsatisfied an execution to any other county than that in which the principal office of a corporation is situated, or its business carried on, before proceeding to enforce the individual liability of the stockholders under How. Stat. §§ 4886–4899, although it may appear that the corporation had property or effects in another county. *Ripley v. Evans*, 217.

4. Act No. 129, Laws of 1883 (3 How. Stat. §§ 3718*a*–3718*h*), section 7 of which provides for the enforcement of the individual liability of stockholders for labor and materials furnished for corporations organized under said act during the time they were stockholders, "at any time after an execution shall be returned not satisfied against such company," must be construed with Act No. 141, Laws of 1877, providing for the enforcement of the individual liability of stockholders, and the execution referred to in the latter act is to issue to the county where the principal office of the corporation is situated, as provided in the 1877 act. *Id.*

5. In a proceeding under How. Stat. §§ 4886–4899, to enforce the individual liability of stockholders, the return of the sheriff of an execution against the corporation, issued to the proper county, unsatisfied, is conclusive between the parties. *Id.* 218.

6. In an attachment suit under the log-lien law of 1887 (Act No. 229) it is not necessary to appraise the property, or to

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STATUTES CONSTRUED—Continued.

serve a *certified* copy of the writ or the inventory upon a log-owner who is not the defendant in the suit; such service being governed by section 6 of the act. *Federspiel v. Johnstone*, 303.

7. The lien of a laborer under the log-lien law of 1887 does not depend upon the state of the accounts between the contractor for whom he labors and the log-owner, whose liability is limited to the contract price, which he pays to the contractor at his peril. *Id.*

8. It was not the intention of the Legislature to permit the holders of swamp-land scrip to enter or select for entry lands which had been occupied by an actual settler under a license issued by the Commissioner of the State Land-office under the provisions of Act No. 229, Laws of 1859 (How. Stat. §§ 5436–5441), and which had been forfeited and abandoned. *Wait v. Commissioner of State Land-office*, 358.

9. The street-railway act of 1855 as amended (chapter 94, How. Stat.) confers no power upon a company organized under it to construct, maintain, and operate a railroad along the side of the traveled portion of a public country highway, with the consent of the township authorities, upon a road-bed not conforming to its grade, but made by means of cuts and fills, without compensation to abutting land-owners, at whose suit equity will perpetually enjoin the maintenance and operation of such a road. *Nichols v. Ann Arbor, etc., Street R'y Co.*, 361.

10. In an action against a railroad company under How. Stat. §§ 3391, 3392, for the negligent killing of the plaintiff's intestate, the damages recoverable are limited to the pecuniary injury sustained by the persons entitled to share in the distribution of his personal estate, which distribution is governed by the statute existing at the time of the death of the intestate. *Richmond v. Chicago & West Mich. R'y Co.*, 374.

11. Where a tax is directed to be raised by the board of supervisors under section 24 of the tax law of 1885, which is not certified to the board by the township clerk pursuant to the provisions of said act, the burden is upon the tax-payer to show that such tax was not originally authorized to be raised by competent authority. *Auditor General v. McArthur*, 457.

12. How. Stat. §§ 9703, 9704, governing debits and credits for

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STATUTES CONSTRUED—Continued.

good conduct or misconduct of convicts in the State prison, are held to contemplate:

a—That the rules in reference to the forfeiture of good time shall be plain, certain, and specific, and known to the inmates of the prison, and be adopted by the board of inspectors, and be of record.

b—That each convict's record as to loss of good time, and for what reason he has lost it, shall be made known to him monthly.

c—That the reports of the infractions of the rules shall be investigated each month at the regular meeting of the inspectors, and passed upon by them, and that a record shall be made of their action, so that the amount of lost time to be deducted from a convict's good time shall not rest upon any computation of the warden's clerk, but may be shown at once from the inspector's records; and the convict who is reported by the officers should be given, if he desires, an opportunity to be heard upon such reports. *In re William Walsh*, 466.

18. In contempt proceedings under How. Stat. chap. 256, to enforce civil remedies, a finding by the court that the complainant has sustained an actual loss or injury by the misconduct complained of, and an order for the payment of some sum as compensation therefor, are conditions precedent to an order that the respondent pay the costs and expenses of the proceedings. *Holland v. Weed*, 584.

14. Where on the dissolution of a banking firm, and the formation of a new one to continue the business, the certificate required by How. Stat. §§ 3128, 3129, giving the names of the members of the new firm, etc., is not filed with the county clerk, such omission cannot be shown by a surviving member of the new firm, in a suit involving the question of its existence, in support of a claim that until the filing of such certificate the old firm could not be legally dissolved and a new one formed. *Wright v. Weimeister*, 595.

STREET RAILWAYS.

The street-railway act of 1855 as amended (chapter 94, How. Stat.) confers no power upon a company organized under it

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STREET RAILWAYS—Continued.

to construct, maintain, and operate a railroad along the side of the traveled portion of a public country highway, with the consent of the township authorities, upon a road-bed not conforming to its grade, but made by means of cuts and fills, without compensation to abutting land-owners, at whose suit equity will perpetually enjoin the maintenance and operation of such a road. *Nichols v. Ann Arbor, etc., Street Ry. Co.*, 361.

See NEGLIGENCE (1, 2, 20, 21).

SUBROGATION—See BILLS AND NOTES (2).

SUBSCRIPTION PAPER—See CONTRACT (5, 6); EQUITABLE LIEN.

SUMMONS.

There is no reason why the mere filling out of a summons by an attorney after it is signed and sealed by the clerk, where no abuse is shown, should vitiate the writ. *Potter v. Hutchison Manfg. Co.*, 59.

SURETY—See PRINCIPAL AND SURETY.

SWAMP LANDS.

1. The term "scrip," as used in the statutes governing the disposition of "State Swamp Lands," so called, means the credit to contractors upon the books in the State Land-office of the number of acres of land, not particularly designated because not selected, to which they are entitled by reason of the acceptance of a portion or the whole of their contracts for the construction of roads or ditches, which scrip, though not otherwise evidenced, has been considered and treated as assignable. *Wait v. Commissioner of State Land-office*, 353.
2. It was not the intention of the Legislature to permit the holders of swamp-land scrip to enter or select for entry lands which had been occupied by an actual settler under a license issued by the Commissioner of the State Land-office under the provisions of Act No. 229, Laws of 1859 (How. Stat. §§ 5436-5441), and which had been forfeited and abandoned. *Id.*

TAXES.

1. The words "unoccupied" and "vacant" are words of the same import. *Hill v. Warrell*, 135.
2. The word "occupied," as used in the tax law of Michigan,

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TAXES—Continued.
does not signify the same as "seated" or "surveyed," as used in the tax laws of some of the other states. *Id.*
8. Unoccupied premises are vacant premises, meaning that there is no one in the actual possession exercising any acts of control over the premises, or any part thereof. *Id.* 186.
4. The provision of the charter of the city of Grand Rapids, requiring unoccupied lots or parts of lots belonging to a resident of the city to be assessed to and in his name, is mandatory, and a non-compliance with such requirement will render the assessment void.
So *held*, where the lot was assessed in the name of the wife of such owner. *Id.*
5. The further provision of said charter that, in case such unoccupied premises belong to a non-resident, they shall be entered accordingly, as is required by law in case of assessments by supervisors of townships, is also mandatory, and a failure to list the lot or lots as non-resident land on a part of the roll separate from the resident land will invalidate the assessment. *Id.*
6. Where a tax is directed to be raised by the board of supervisors under section 24 of the tax law of 1885, which is not certified to the board by the township clerk pursuant to the provisions of said act, the burden is upon the tax-payer to show that such tax was not originally authorized to be raised by competent authority. *Auditor General v. McArthur*, 457.
7. The record of the proceedings of a township board at a special meeting showed that only one justice was present, and failed to show that notice was given to the other justice. It appeared that $1,000 was voted to be raised for township expenses, $1,000 as a special tax for bridge purposes, and $1,000 to pay indebtedness, but the record failed to show the neglect or refusal of the electors to vote taxes for such purposes. And it is held that the taxes thus voted are invalid. *Id.*
8. The exemption of four surveyed townships in a school-district from a general school tax levied upon the remaining territory is fatal to the validity of the tax levy, the law under which the district was organized requiring that all taxes should be spread upon all of the taxable property of the district. *Id.*
See MUNICIPAL CORPORATIONS.

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TIMBER—See LICENSE TO CUT TIMBER.

TOWNSHIP BOARD—See TAXES (7).

TRIAL—See PRACTICE IN CIRCUIT COURT.

TROVER—See EVIDENCE (26, 28, 29).

TRUSTS AND TRUSTEES—See GUARDIAN AND WARD (2).

WATERS AND WATER-COURSES.

1. Complainant and defendants own adjoining parcels of land bordering upon the waters of Green Bay, which is a part of the waters of Lake Michigan, and navigable for all classes of vessels. Both parties own and are operating saw-mills, and have constructed wharves to the deep water of the bay, upon which to pile and from which to ship their lumber. The question in dispute in this case relates to the division line of their respective holdings, under the waters of the bay, in deciding which the Court adopt the Massachusetts rule, which is defined as follows:

   a—To measure the whole extent of the ancient bank or line of the cove or bay, and compute how many rods, yards, or feet each riparian owner upon such line has.

   b—To divide the newly-formed line into as many equal portions as those contained in the shore line, and then draw straight lines from the point at which the proprietors respectively bounded on the old to the points thus determined as the points of division on the newly-formed line, *Blodgett & Davis Lumber Co. v. Peters*, 498.

2. This rule may require modification under particular circumstances in order to secure equal justice, and, in ascertaining the shore line or margin of the water, a general line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp projections, so that that line shall embrace the general available line of the shore. *Id.*

3. The object to be kept in view in cases of this kind is to secure to each proprietor access to navigable water, and an equal share of the dockage line at navigable water in proportion to his share on the original shore line of the bay. *Id.*

WEARING APPAREL—See HUSBAND AND WIFE (1).

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WILL.

1. A wife, after providing a life-support for her husband from the income, and, if necessary, by the use of her entire estate, bequeathed $500 of the residue to his niece, in consideration of her care and assistance towards the testatrix and her husband, to be performed during their natural lives; which provision is held not to be in terms a condition, but rather an expression of the reason or inducement for the legacy, which vested on the death of the testatrix, subject to being divested in case the entire estate was required for the husband's support. *McCarty v. Fish*, 48.
2. A wife willed her entire estate to her husband, for and during his natural life-time, to be used by him in defraying his necessary expenses, and provided that, if the income was insufficient for that purpose, he might use so much of the principal as might be necessary, and that, if there was any property left after paying said expenses, certain legacies should be paid therefrom, and the remainder, if any, was bequeathed to a daughter. And it is held that the husband did not take the whole estate absolutely at the death of the testatrix, but a life-support, to be furnished from the income, if sufficient, and, if not, by the use of so much of the principal as might be necessary for that purpose. *Id.*
3. In order to secure a surety, the principal inserted an agreement in her will to pay to him upon her death $5,000, which she declared should be a first lien upon the estate she should leave at her death, and directed her executor to pay said sum to the surety out of *said* estate after paying her funeral expenses. And it is held that the provision in no way interfered with the disposition or use by the testatrix of any or all of the property she possessed when the will was made, and that the lien only attached to the estate remaining at her death. *Nash v. Burchard*, 85.
4. Where a non-resident defendant dies after the entry of judgment, and the suit is revived in the name of an executor, who is appointed on the probate of defendant's will in this State, and removes the judgment by writ of error to this Court for review, an objection that the executor has no standing in Court, it not appearing that the testator had any property in this State, is untenable, the question being ruled by *In re McCarty*, 81 Mich. 460. *Hubbell v. Blandy*, 209.

See MANDAMUS (1).

WITNESS—See EVIDENCE (1).

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